Supreme Court, U.S.
FILED

961432 MAR 10 1997

OFFICE OF THE CLERK

No. _____

In The

Supreme Court of the United States

October Term, 1996

YOURDON, INC.,

Petitioner,

vs.

SUSAN Q. BRIDGES, VIRGINIA D'APONTE and KIMBERLY MURYASZ,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR WRIT OF CERTIORARI

Mark A. Gerard
Counsel of Record
Thomas G. Dignan
NIXON, HARGRAVE, DEVANS & DOYLE LLP
Clinton Square, P.O. Box 1051
Rochester, New York 14603-1051
(716) 263-1000
Counsel for Petitioner

Daily Record Corporation
Rochester, New York
(22087)

76 pp

QUESTIONS PRESENTED

1. Whether this Court's ruling in Hensley v. Eckerhart, 461 U.S. 424 (1983) and adhered to in Farrar v. Hobby, 506 U.S. 103 (1992), that the degree of success is the most critical factor in determining the reasonableness of fee awards, is only to be followed, as the Second Circuit has done, where plaintiffs have obtained nominal damages, and otherwise ignored?

2. Whether 42 U.S.C. 2000e-5(k) authorizes the award of attorney's fees to civil rights plaintiffs who recover no damages whatsoever under Title VII but recover under a state statute?

PARTIES TO THE PROCEEDING, PARENT COMPANIES AND NONWHOLLY OWNED SUBSIDIARIES

All of the parties in the appeal to the United States Court of Appeals for the Second Circuit are listed in the caption. Petitioner Yourdon, Inc. ("Yourdon") has been merged into CGI Systems, Inc., whose parent company is Compagnie Generale de Informatique, whose parent company is IBM Europe, S.A., whose parent company is International Business Machines Corporation. Neither Yourdon nor CGI Systems, Inc. have any non-wholly owned subsidiaries.

TABLE OF CONTENTS

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDING, PARENT COMPANIES AND NONWHOLLY OWNED SUBSIDIARIES ii

TABLE OF CONTENTS iii

TABLE OF CITED AUTHORITIES vi

OPINIONS BELOW 2

JURISDICTION 2

STATUTORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 3

REASONS FOR GRANTING THE WRIT 6

1. THE SECOND CIRCUIT'S DECISIONS ON FEE-SHIFTING ARE IN CONFLICT WITH FARRAR v. HOBBY, 506 U.S. 103 (1992) AND PRIOR RULINGS OF THIS COURT 6

2. THE SECOND CIRCUIT'S HOLDINGS ON FEE-SHIFTING ARE IN CONFLICT WITH OTHER CIRCUITS, WHICH HAVE HELD

THAT THE DEGREE OF SUCCESS OBTAINED MUST BE CONSIDERED IN DETERMINING AN APPROPRIATE FEE AWARD 10

3. THE SECOND CIRCUIT'S ALLOWANCE OF FEES TO A PLAINTIFF WHO RECOVERED NO DAMAGES UNDER TITLE VII, AND ONLY LIMITED DAMAGES UNDER A STATE CLAIM, DISREGARDS STATUTORY LANGUAGE, THREATENS PUBLIC POLICY, AND PRESENTS A VITAL QUESTION OF FEDERAL LAW THAT HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT 15

A. A Plaintiff's Recovery Under a State Statute is Irrelevant for the Purposes of Title VII Fee-Shifting 17

4. THERE IS A PRESSING NEED FOR A RULING BY THIS COURT 20

CONCLUSION 23

APPENDIX A-1

Decision of the United States Court of Appeals for the Second Circuit, decided and filed December 10, 1996 ..... A-1

Corrected Opinion of the United States District Court for the Southern District of New York, dated February 6, 1996 ..... A-8

Opinion of the United States Court of Appeals for the Second Circuit, issued as Mandate January 2, 1997 ..... A-39

Judgment of United States District Court for the Southern District of New York, filed February 15, 1996 ..... A-41

TABLE OF CITED AUTHORITIES

CASES

Albright v. Good Shepherd Hosp., 901 F.2d 438 (5th Cir. 1990) . . 18

Andrade v. Jamestown Hous. Auth., 82 F.3d 1179 (1st Cir. 1996) . 12

Bray v. Alexandria Women's Health Clinic, 506 U.S. 263 (1993) . . 18

Bridges v. Eastmar Kodak Co., et al., 102 F.3d 56 (2d Cir. 1996) . . 2

Carroll v. Blinken, No. 95-9153, 1997 U.S. App. LEXIS 575 (2d Cir. January 15, 1997) 13

Carson v. American Brands, Inc., 450 U.S. 79 (1981) 22

Cartwright v. Stamper, 7 F.3d 106 (7th Cir. 1993) 19

Christiansburg Garment Co. v. E.E.O.C., 434 U.S. 412 (1978) 21

Corder v. Brown, 25 F.3d 833 (9th Cir. 1994) 12

Cowan v. Prudential Ins. Co., 935 F.2d 522 (2d Cir. 1991) . . . 6,10,14

Cramblit v. Fikse, 33 F.3d 633 (6th Cir. 1994) 19

Farrar v. Hobby, 506 U.S. 103 (1992) i,6,7 8,9,19-20

Hanrahan v. Hampton, 446 U.S. 754 (1980) 15

Hensley v. Eckerhart, 461 U.S. 424 (1983) i,6,7,8 20,21

Hetzel v. County of Prince William, 89 F.3d 169 (4th Cir.), cert. denied, __ U.S. __, 117 S. Ct. 584 (1996) 11,12

Hewitt v. Helms, 482 U.S. 755 (1987) 16,17

Jackson v. Galan, 868 F.2d 165 (5th Cir. 1989) 17

Kelly v. Leesville, 897 F.2d 172 (5th Cir. 1990) 19

Lewis v. Kendrick, 944 F.2d 949 (1st Cir. 1991) 12

Lunday v. City of Albany, 42 F.3d 131 (2d Cir. 1994) 13

Mateyko v. Felix, 924 F.2d 824 (9th Cir.), cert. denied, 502 U.S. 814 (1991) 18

McGinnis v. Kentucky Fried Chicken, 51 F.3d 805 (9th Cir. 1994) 10,11

McLaughlin v. State, 784 F. Supp. 961 (N.D.N.Y. 1992) 15

Milton v. Des Moines, 47 F.3d 944 (8th Cir. 1995), cert. denied, __ U.S. __, 116 S. Ct. 87 (1995) 19

National Org. for Women v. Operation Rescue, 37 F.3d 646 (D.C. Cir. 1994) 18

National Private Truck Council v. Oklahoma Tax Comm'n, __ U.S. __, 115 S.Ct. 2351 (1995) 19

New York Gaslight Club, Inc. v. Carey, 447 U.S. 54 (1980) 18

Orchano v. Advanced Recovery, Inc., No. 96-7701,
1997 U.S. App. LEXIS 2198 (2d Cir. February 11, 1997) .. 10,13

Paz v. Long Island R.R., No. 99-CV-557, 1997 U.S. Dist
LEXIS 1408 (E.D.N.Y. February 12, 1997) 18

Pedigo v. P.A.M. Transp., Inc., 98 F.3d 396 (8th Cir. 1996) 17

Pino v. LoCascio, 101 F.3d 235 (2d Cir. 1996) 13

Polacco v. Curators of Univ. of Mo., 66 Fair Empl.
Prac. Cas. 61 (8th Cir. 1994) 12

Quartino v. Tiffany & Co., 948 F. Supp. 332 (S.D.N.Y. 1996) ... 14

Rhodes v. Stewart, 488 U.S. 1 (1988) 15,16,17

Riverside v. Rivera, 477 U.S. 561 (1986) 7,8,20

Romberg v. Nichols, 48 F.3d 453 (9th Cir. 1995) 19

Sheppard v. Riverview Nursing Ctr., 88 F.3d 1332 (4th Cir.),
cert. denied, __ U.S. __, 117 S. Ct. 483 (1996) 12

Slade v. United States Postal Service, 952 F.2d 357
(10th Cir. 1991) 17

Texas State Teachers Ass'n v. Garland Indep. School Dist.,
489 U.S. 782 (1989) 15,21

Walker v. Anderson Elec. Connectors, 944 F.2d 841 (11th Cir. 1991), cert. denied, 506 U.S. 1078 (1993) 17

Zook v. Brown, 865 F.2d 887 (7th Cir. 1989) 12

STATUTES AND OTHER AUTHORITIES

28 U.S.C. §1254(1) 2

28 U.S.C. § 1291 5

28 U.S.C. § 1367 5

Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988(b) 2,6,12

New York State Human Rights Law, Executive Law, Article 15, § 291, et seq. 3,17,18

S. Rep. No. 94-1011, 94th Cong., 2nd Sess., (1976), reprinted in 1976 U.S.C.C.A.N. 5908 9

Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, et seq ..... passim

42 U.S.C. 2000e-5(k) ..... passim

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1996

YOURDON, INC.,

Petitioner,

vs.

SUSAN Q. BRIDGES, VIRGINIA
D'APONTE and KIMBERLY MURYASZ,

Respondents.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Second Circuit

PETITION FOR WRIT OF CERTIORARI

Petitioner *Yourdon, Inc.* respectfully requests that this Court issue a writ of certiorari to review the order of the United States Court of Appeals for the Second Circuit, entered in the above-captioned proceeding on December 10, 1996.

OPINIONS BELOW

The December 10, 1996 order of the United States Court of Appeals for the Second Circuit is reproduced in the Appendix at A-1. Bridges v. Eastman Kodak Co., et al., 102 F.3d 56 (2d Cir. 1996). The February 6, 1996 opinion of the United States District Court for the Southern District of New York is not reported and is reproduced in the Appendix at A-8.

JURISDICTION

The opinion and judgment of the United States Court of Appeals for the Second Circuit were entered on December 10, 1996. This petition for certiorari was filed within 90 days of that date and is timely. The Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(k):

> (k) Attorney's Fee . . .
>
> In any action or proceeding under this subchapter the court, in its discretion, may allow the prevailing party, other than the Commission or the United States, a reasonable attorney's fee (including expert fees) as part of the costs. . . .

Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988(b):

> (b) Attorney's Fees
>
> In any action or proceeding to enforce a provision of sections 1981, 1981a, 1982, 1983, 1985, and 1986 of this title . . ., the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

STATEMENT OF THE CASE

The questions presented by this case are, first, whether in determining the reasonableness of a fee awarded a prevailing party, courts must consider the degree of success achieved, and, second, whether 42 U.S.C. 2000e-5(k) authorizes the award of attorney's fees to civil rights plaintiffs who recover no damages whatsoever under Title VII but recover under a state statute.

These issues arise from an action filed by respondents Susan Bridges ("Bridges"), Virginia D'Aponte ("D'Aponte") and Kimberly Muryasz ("Muryasz") (collectively "respondents") for alleged civil rights violations under Title VII of the Civil Rights Act of 1964, as amended, ("Title VII"), 42 U.S.C. § 2000e, et seq., and the New York Human Rights Law ("Human Rights Law"), N.Y. Executive Law § 296, et seq. (Complaint, R-600-619).[1] After they chose to leave their employ, respondents sued Eastman Kodak Company ("Kodak"), Yourdon, Inc. ("Yourdon"), Thomas Walker ("Walker"), John Kucik ("Kucik"), Michael French ("French"), Kevin Cash ("Cash"), Mary Heaphy ("Heaphy") and David Offenhartz ("Offenhartz") (collectively "defendants"), for money damages. (R-600-601).

The complaint sought a total of $100 million dollars and equitable relief. (R-600-619). More particularly, respondents Bridges, D'Aponte and Muryasz sought $10 million dollars each under Title VII for alleged hostile environment sexual harassment (R-615), $10 million dollars each under Title VII for alleged quid pro quo sexual harassment (R-617), and $10 million dollars each for alleged violations of the New York Human Rights Law. (R-618).

---

[1] References designated "R-[page number]" refer to the joint record on appeal. Those designated "A-[page number]" refer to the decisions and judgments attached as an Appendix.

An additional $10 million dollars in punitive damages was sought on behalf of all plaintiffs under state law and under Title VII. Id.

After a nine day trial in which respondents only sought money damages from the jury and the district court below, the jury completely exonerated defendants Kucik, Walker and French of each and every one of plaintiffs' claims against them, and found each of them innocent of hostile environment sexual harassment, quid pro quo sexual harassment, and aiding and abetting in sexual harassment. (R-270, 761).[2] Neither the jury nor the district court found that Kodak and Yourdon were a single employer. (R-770-772). On their claims for back pay, the jury awarded Bridges nothing, awarded D'Aponte $12,043.61 and awarded Muryasz $10,385.66. (R-269).

On September 7, 1995, the district court ruled that defendant Eastman Kodak Company was not liable for any of respondents' claims. (R-770-772, A-10). It further followed the jury's verdict and found Kucik, Walker and French not liable on respondents' federal claims. Lastly, in order to avoid awarding a "double recovery," the district court "denie[d] plaintiffs' [federal] back pay claims under Title VII." (R-773).[3]

In sum, of the $70 million dollars respondents sought under Title VII, two of them together received a total of $22,429.27, and

---

[2] The district court had previously dismissed respondents' state law claims for punitive damages (R-688-689), and granted petitioner's motion that the Civil Rights Act of 1991 was not retroactively applicable. (R-721-723). Respondents' claims against defendants Heaphy and Offenhartz were also dismissed. (R-748).

[3] Respondents appealed the district court's September 7, 1995 decision and order. (R-828, 829). On April 23, 1996, an order was filed in the Second Circuit dismissing respondents' appeal in its entirety. (R-830-831).

Bridges received nothing. (R-269). Respondents were never awarded any injunctive relief or reinstatement, and, in fact, they dropped any pretense of seeking these as remedies during trial.

Respondents thereafter moved the district court for $1,185,569.30 in fees and expenses, nearly 53 times that which they recovered on their Title VII claims, based, it would appear, upon the purported expenditure of 4,613.75 hours. (R-269, 275, A-3).

The district court, in a February 6, 1996 written decision and order, granted respondents' application for attorneys' fees and costs in the amount of $753,202.99. (Opinion, dated February 6, 1996, A-8; Judgment, A-41). Despite the fact that Bridges was awarded $0 on her federal claims, the district court found her to have "prevailed." (A-14). In addition, notwithstanding the fact that plaintiffs were awarded a fraction of what had been claimed for money damages under Title VII in their complaint, the district court refused to reduce plaintiffs' fee request as a result of any comparison between the lack of success obtained by plaintiffs and the exorbitant fees requested. (A-29).

Yourdon appealed and respondents cross-appealed. The United States Court of Appeals for the Second Circuit affirmed the judgment below in all respects, expressly declining to address in any detail the issue raised by petitioner that the amount awarded should be reduced based upon the lack of success obtained by respondents. (A-4)

The basis of federal jurisdiction was 42 U.S.C. § 2000e, et seq. and 28 U.S.C. § 1367 in the district court, and 28 U.S.C. § 1291 in the court of appeals.

REASONS FOR GRANTING THE WRIT

1. THE SECOND CIRCUIT'S DECISIONS ON FEE-SHIFTING ARE IN CONFLICT WITH FARRAR v. HOBBY, 506 U.S. 103 (1992) AND PRIOR RULINGS OF THIS COURT

Not once does the district court refer to Farrar v. Hobby, 506 U.S. 103 (1992) (construing 42 U.S.C. § 1988)[4], in its opinion dated February 6, 1996. Rather, the district court relied upon Cowan v. Prudential Ins. Co., 935 F.2d 522 (2d Cir. 1991), a decision which predates the Supreme Court's decision in Farrar, and which provided:

> we reaffirm . . . as the law of this circuit: A presumptively correct 'lodestar' figure should not be reduced simply because a plaintiff recovered a low damage award.

Cowan, 935 F.2d at 526. In the instant case, the district court relied upon this statement. (A-29). The district court's failure to follow this Court's holdings was an abuse of discretion sanctioned by the Second Circuit.

It has been this Court's rule that the extent of a prevailing party's success is a crucial factor in determining the proper amount of attorneys' fees to be awarded. See, e.g., Hensley v. Eckerhart, 461 U.S. 424, 440 (1983); Farrar v. Hobby, 506 U.S. at 114. Indeed, "the most critical factor" in determining the reasonableness

---

[4] Section 2000e-5(k) of Title VII, the applicable provision in this case, and 42 U.S.C. § 1988 impose a similar standard. See Hensley v. Eckerhart, 461 U.S. 424, 433, n. 7 (1983) (involving 42 U.S.C. § 1988 and providing that "[t]he standards set forth in this opinion are generally applicable in all cases in which Congress has authorized an award of fees to a 'prevailing party'").

of a fee award is the degree of success obtained. Farrar, 506 U.S. at 114.

In Farrar, this Court reviewed plaintiff's complaint, which, on its face, sought $17 million dollars, and determined that the only appropriate fee was no fee at all based on the degree of the plaintiff's success. In the present case, respondents sought over $70 million dollars on their federal claims, but only received $22,429.27 in back pay, the only Title VII remedy they sought at trial.

As this Court observed in Hensley, "[a] reduced fee award is appropriate if the relief, however significant, is limited in comparison to the scope of the litigation as a whole." 461 U.S. at 440. In other words, "where the plaintiff achieved only limited success, the district court should award only that amount of fees that is reasonable in relation to the results obtained." Id. Moreover, this Court has ruled:

> Where recovery of private damages is the purpose of . . . civil rights litigation, a district court, in fixing fees, is obligated to give primary consideration to the amount of damages awarded as compared to the amount sought.

Farrar, 506 U.S. at 114-115 (quoting Riverside v. Rivera, 477 U.S. 561, 585 (1986), Powell, J., concurring).

Applying Hensley, the dissenting Justices in Riverside,[5] objected to the plurality's approval of an attorney's fee award of $245,456.25 in a case that netted $33,350 in damages. 477 U.S. at

---

[5] Then Chief Justice Burger filed a dissenting opinion in Riverside, and Chief Justice Rehnquist filed a separate dissenting opinion in which Chief Justice Burger and Justices White and O'Connor joined. Justice Powell filed an opinion in which he noted that the fee award in that case "seems unreasonable" on its face, but ultimately concurred in the judgment on grounds that suggest he would not have voted to uphold the district court's grossly disproportional fee award in this case.

588. Recalling Hensley's mandate that counsel exercise "billing judgment" in requesting an attorney's fee award, the dissenting Justices contended that spending close to 2,000 hours on a case that recovered only $33,000 was "simply not a 'reasonable' expenditure of time." 477 U.S. at 595. The dissent observed:

> One may agree with all of the glowing rhetoric contained in the plurality's opinion about Congress' noble purpose in authorizing attorney's fees under § 1988 without concluding that Congress intended to turn attorneys loose to spend as many hours as possible to prepare and try a case that could reasonably be expected to result only in a relatively minor award of monetary damages.

Id.

Although a strict proportionality approach was rejected by the Riverside plurality, that respondents' counsel in the instant case requested over a 5,285 percent markup in fees and costs, and, further, that the district court awarded respondents' counsel an equally astounding 3,358 percent markup over that which respondents recovered on their federal claims demonstrates the unreasonableness of the district court's decision. See Riverside, 477 U.S. at 586, n.3, Powell, J., concurring ("[i]t probably will be the rare case in which an award of private damages can be said to benefit the public interest to an extent that would justify the disproportionality between damages [$33,350.00] and fees [$245,456.25] reflected in this case"); see also id. at 587, Burger, Ch. J., dissenting ("it would be difficult to find a better example of legal **nonsense** than the fixing of attorney's fees by a judge at $245,456.25 for the recovery of $33,350 damages") (emphasis added).

Moreover, section 1988 [and, by the same token, § 2000e-5(k) of Title VII] "is not 'a relief Act for lawyers.'" Farrar, 506 U.S. at 122, O'Connor, J., concurring (quoting Riverside, 477 U.S.

at 588, Rehnquist, J., dissenting). It has long been settled that fee awards "were never intended to produce windfalls to attorneys." Farrar, 506 U.S. at 115 (citations omitted). Indeed, the legislative history makes this point. See S. Rep. No. 94-1011, 94th Cong., 2nd Sess., at 6 (1976), reprinted in 1976 U.S.C.C.A.N. 5908, 5913. Based on respondents' limited success, however, the Second Circuit approved just such a windfall to respondents' attorneys.

Respondents concede that "[t]he object of [their] litigation was to recover private monetary damages for all three plaintiffs." (Respondents' brief before the Second Circuit, p. 25). Yourdon agrees that such was respondents' objective throughout this litigation. Respondents sought money; they did not seek to redress the civil rights of any individuals. Given that respondents sought over $70 million dollars on their federal claims, but only received $22,429.27 in back pay for only two of the three plaintiffs, they hardly obtained their objective. Indeed, respondents recovered approximately .000320 of what had been claimed under Title VII in the complaint.[6]

Just as the district court failed to do, the Second Circuit also failed to acknowledge the fact that on their federal claims, respondents lost entirely as against six of the eight named defendants in this action. Indeed, even with respect to defendants Yourdon and Cash, respondents lost on their claims of quid pro quo sexual harassment, their initial claims for equitable relief, their demand for retroactive application of the Civil Rights Act of 1991, and their claims for punitive damages under both federal and state law.

---

[6] See Farrar, 506 U.S. at 119, O'Connor, J., concurring ([c]himerical accomplishments are simply not the kind of legal change that Congress sought to promote in the fee statute").

Despite its failure to address the issue, and thereby giving tacit approval to the district court's refusal to follow Farrar, the position of the circuit is clear. As it stated less than one month ago:

> 'A presumptively correct 'lodestar' figure should not be reduced simply because a plaintiff recovered a low damage award.'

Orchano v. Advanced Recovery, Inc., No. 96-7701, 1997 U.S. App. LEXIS 2198 (2d Cir. February 11, 1997) (quoting Cowan v. Prudential Ins. Co., 935 F.2d 522 (2d Cir. 1991)).

Because the decisions of both the Second Circuit and the district court are in direct conflict with this Court's rulings, a writ should be granted.

2. THE SECOND CIRCUIT'S HOLDINGS ON FEE-SHIFTING ARE IN CONFLICT WITH OTHER CIRCUITS, WHICH HAVE HELD THE DEGREE OF SUCCESS OBTAINED MUST BE CONSIDERED IN DETERMINING AN APPROPRIATE FEE AWARD

Other circuits have correctly applied the tenor of Farrar and have confirmed that in order to arrive at an appropriate fee award the degree of success obtained in the litigation must be considered regardless of whether the damages awarded are $1.00 or more than $1.00.

In McGinnis v. Kentucky Fried Chicken, 51 F.3d 805 (9th Cir. 1994), the Ninth Circuit held that, based upon the Farrar standard, it is an abuse of discretion for a district court to award attorneys' fees without considering the relationship between the extent of success and the amount of the fee award. In that case, a single plaintiff won $34,000, well above that which the three respondents were awarded against Yourdon in this case. The Ninth Circuit held that the district court abused its discretion in awarding $148,000 in fees, far less than the amount the district court awarded

against Yourdon in this case, based upon the lack of success obtained by plaintiff. In so holding the Ninth Circuit ruled that "[n]o reasonable person would pay lawyers $148,000 to win $34,000." The court continued:

> [T]he benefit [afforded plaintiffs' attorneys in the private attorney-general theory] is not infinite. What lawyers do for their actual client is an important measure of 'extent of success.' The district court must reduce the attorneys' fees award so that it is commensurate with the extent of the plaintiff's success.

Id. at 810.

Surely, no reasonable person would pay $753,202.99 (as the Second Circuit erroneously affirmed against Yourdon) to win $22,429.27.

Similarly, the Fourth Circuit has held that it was "clearly wrong" for a district court to award a plaintiff $176,293 in attorneys' fees where the plaintiff would ultimately receive less than $500,000 out of the $9.3 million dollars in damages she originally requested. Hetzel v. County of Prince William, 89 F.3d 169 (4th Cir.), cert. denied, __ U.S. __, 117 S. Ct. 584 (1996). In vacating the district court's fee award, the Fourth Circuit ruled:

> Especially in light of our determination that the evidence does not support a substantial damage award, we believe the award of $176,293 in attorneys' fees was 'clearly wrong.' Given the limited results she obtained in this case, Hetzel is not entitled to an award of significant, much less full, attorneys' fees. As the Supreme Court has instructed, "'where recovery of private damages is the purpose of.... civil rights litigation, a district court, in fixing fees, is obligated to give primary

> consideration to the amount of damages awarded as compared to the amount sought.'"

Id., 89 F.3d at 173 (citing Farrar) (citations omitted).

Other circuits have similarly applied the Farrar and Hensley standard in situations where more than nominal damages are awarded. See Andrade v. Jamestown Hous. Auth., 82 F.3d 1179 (1st Cir. 1996) (affirming 91% reduction of lodestar based upon plaintiff's limited damages); Polacco v. Curators of Univ. of Mo., 66 Fair Empl. Prac. Cas. 61 (8th Cir. 1994) (affirming, under the principles of Hensley and Farrar, district court's reduction of fees because of limited success); Corder v. Brown, 25 F.3d 833 (9th Cir. 1994) (holding that, under Farrar, district court's calculation of fees to be an abuse of discretion, given plaintiffs' "very limited success"); Lewis v. Kendrick, 944 F.2d 949, 954-56 (1st Cir. 1991) (denying all fees where plaintiff recovered only $1,000 and submitted a request for $50,000); Zook v. Brown, 865 F.2d 887, 895-96 (7th Cir. 1989) (affirming a 75% reduction in attorney's fees for limited success).

In fact, the Fourth Circuit has held that "Farrar requires that courts consider the relationship between the fees and the degree of the plaintiff's success" and, further that "considerations of proportionality **should** guide the decision whether to award fees." Sheppard v. Riverview Nursing Ctr., 88 F.3d 1332, 1335 (4th Cir.), cert. denied, __ U.S. __ , 117 S. Ct. 483 (1996) (emphasis added). Moreover, "[f]actoring proportionality concerns into the analysis helps guard against [the following which "Congress was wary to enact"]":

> legislation [including 42 U.S.C. § 2000e-5(k) and 42 U.S.C. § 1988] whose benefit inures primarily to lawyers in the form of a substantial fee recovery, even if relief to the plaintiff is otherwise trivial and the lawsuit promotes few public goals.

Id. at 1336. The court continued: "Farrar was designed to prevent a situation in which a client receives a pyrrhic victory and the lawyers take a pot of gold." Id. at 1339. Interestingly, what the Fourth Circuit referred to as a "pot of gold" was the district court's improper award of $40,000 in attorneys' fees, over $1.1 million dollars less that which respondents sought in their fee and cost application, and well over $700,000 less that which the Second Circuit erroneously approved in the instant case.

> In stark contrast, however, the Second Circuit has stated: [W]e consistently have resisted a strict proportionality requirement in civil rights cases.

Lunday v. City of Albany, 42 F.3d 131, 134-135 (2d Cir. 1994).[7] With respect to occasions in which anything more than nominal damages are awarded, the Second Circuit appears utterly at odds with these other circuits. Indeed, the Second Circuit restated less than one month ago that "'[a] presumptively correct 'lodestar' figure should not be reduced simply because a plaintiff recovered a low damage award.'" Orchano v. Advanced Recovery, Inc., No. 96-7701, 1997 U.S. App. LEXIS 2198 (2d Cir. February 11, 1997), citations omitted. The Second Circuit further distanced itself from Farrar's precepts:

> The reduction of a requested fee merely because the damages recovery was small is 'error unless the size of the award is

---

[7] Although the Second Circuit has affirmed the mere reduction of attorneys' fees in certain limited situations, it appears that the circuit has done this primarily where no monetary damages or only nominal damages are awarded. See Carroll v. Blinken, No. 95-9153, 1997 U.S. App. LEXIS 575 (2d Cir. January 15, 1997) (allowing $25,000 fee award where "[t]here was no damage award"); Pino v. LoCascio, 101 F.3d 235 (2d Cir. 1996) (denying fees where only $1.00 damage award).

> the result of the quality of representation,' for 'tying that award to the amount of damages would subvert the statute's goal of opening the court to all who have meritorious civil rights claims.'

Id., at *11-12 (quoting DiFilippo v. Morizio, 759 F.2d 231 (2d Cir. 1985)).

It was against this backdrop of similar Second Circuit rulings that the court below held in the instant case: "We affirm across the board, and write only to address Bridges' eligibility for attorney's fees and costs. (A-4). The Second's Circuit's decision pointedly circumvents the Farrar standard, and such an abdication of appellate review is improper.[8] Indeed, the exercise of judicial power is not satisfied by limited appellate review.

Finally, the Second Circuit's refusal to apply the decisions of this Court has caused confusion at the district court level:

> The most significant question is what proportion of the lodestar. . . should be awarded. . . . The resolution of this question raises fundamental issues of public policy which have been debated in both the Supreme Court and the Second Circuit. It is far from clear, however, how either of those courts would answer these questions today.
>
> * * *
>
> [T]he rationale of [the Second Circuit's decisions in] Cowan and Lunday appears inconsistent with Farrar and with the views of at least five of the Justices who decided [Riverside v.] Rivera. . . .

Quartino v. Tiffany & Co., 948 F. Supp. 332 (S.D.N.Y. 1996).

---

[8] The court below acknowledges Yourdon's position that there should have been a reduction for plaintiffs' limited success, but avoids any detailed analysis. (A-6).

Because of the import of this issue and the divergent views of the circuits on it, this Court's intercession is needed to settle the matter.

3. THE SECOND CIRCUIT'S ALLOWANCE OF FEES TO A PLAINTIFF WHO RECOVERED NO DAMAGES UNDER TITLE VII, AND ONLY LIMITED DAMAGES UNDER A STATE CLAIM, DISREGARDS STATUTORY LANGUAGE, THREATENS PUBLIC POLICY, AND PRESENTS A VITAL QUESTION OF FEDERAL LAW THAT HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT

In order to obtain an award of attorneys' fees under Title VII, a party must prevail on the merits of at least some of his or her claims. Hanrahan v. Hampton, 446 U.S. 754, 757 (1980) (construing 42 U.S.C. § 1988).

The clear language of Title VII only permits the award of fees in any action "under this subchapter." 42 U.S.C. § 2000e-5(k). In other words, "a threshold to recovery of attorney's fees is that the plaintiff must prevail in **the underlying Title VII** action." McLaughlin v. State, 784 F. Supp. 961, 980 (N.D.N.Y. 1992) (emphasis added). "[A]t a minimum," Bridges was required to "point to a resolution of the dispute which changes the legal relationship between [Bridges] and the defendant." Texas State Teachers Ass'n v. Garland Indep. School Dist., 489 U.S. 782, 792 (1989). More importantly, a plaintiff must receive at least some relief on the merits of her Title VII claim before she can be said to prevail. See Hanranhan, 466 U.S. at 757; see also, Rhodes v. Stewart, 488 U.S. 1, 3 (1988).

Bridges received no such relief. Indeed, the district court awarded Bridges nothing in back pay, the only Title VII remedy she or the other two plaintiffs sought at trial. The district court further

conceded that Bridges was not entitled to any damages under Title VII. Therefore, she cannot be deemed to have prevailed in any sense. Notwithstanding the fact that Bridges received none of the requested and available relief under Title VII, the district court held Bridges to be a prevailing party. This was reversible error.

In order to reach that incorrect holding, the district court was constrained to rule that plaintiff was "subjected to sexual harassment under the terms of Title VII." (A-12). It is well-established, however, that the mere declaration by a court that there is a violation without any available remedy is insufficient:

> In all civil litigation, the judicial decree is not the end but the means. At the end of the rainbow lies not a judgment, but some action (or cessation of action) by the defendant that the judgment produces--the payment of damages or some specific performance or the termination of some conduct.

Rhodes, 488 U.S. at 3-4 (quoting Hewitt v. Helms, 482 U.S. 755, 761 (1987)). This Court has held that a declaratory judgment or advisory opinion "will constitute relief, for purposes of § 1988 [or, presumably, § 2000e-5(k) of Title VII] if, and only if, it affects the behavior of the defendant toward the plaintiff." Id. at 4.

As the Court explained in Hewitt, the court -- and the judgment -- are merely the vehicle by which the plaintiff seeks to reach the intended destination, and only by reaching that destination does the plaintiff "prevail":

> Redress is sought through the court, but from the defendant. . . . The real value of the judicial pronouncement -- what makes it a proper judicial resolution of a 'case or controversy' rather than an advisory opinion -- is in the settling of some dispute which affects the behavior of the defendant towards the plaintiff.

Hewitt, 482 U.S. at 761 (italics omitted); see also Slade v. United States Postal Service, 952 F.2d 357 (10th Cir. 1991) (even final order by EEOC requiring defendant to reconduct procedure found to have violated plaintiff's civil rights was not necessarily sufficient to render plaintiff a prevailing party under Title VII); Jackson v. Galan, 868 F.2d 165 (5th Cir. 1989) ("[t]he moral satisfaction of knowing that a federal court believes one's rights have been violated does not alone constitute the sort of relief which suffices to invoke § 1988 [or presumably § 2000e-5(k)] for an award of attorneys' fees"); Pedigo v. P.A.M. Transp., Inc., 98 F.3d 396 (8th Cir. 1996) (judicial pronouncement of violation without enforceable judgment cannot render prevailing party status under § 1988).

Because Bridges was awarded no such relief, Yourdon's behavior towards Bridges was not in any way changed or affected by virtue of Bridges' Title VII claim. Not one cent was awarded to Bridges on that claim. Therefore, Bridges can neither be deemed prevailing nor awarded attorneys' fees on her wholly unsuccessful federal claim. Rhodes, 488 U.S. at 4 ("[i]n the absence of relief, a party cannot meet the threshold requirement of § 1988 [or § 2000e-5(k) of Title VII] that [s]he prevail, and in consequence [s]he is not entitled to an award of attorney's fees"); Walker v. Anderson Elec. Connectors, 944 F.2d 841, 847 (11th Cir. 1991), cert. denied, 506 U.S. 1078 (1993) ("to be a prevailing party for purposes of 42 U.S.C. § 2000e-5(k) requires the attainment of something more tangible than a [] finding of sexual harassment").

A. A Plaintiff's Recovery Under a State Statute is Irrelevant for the Purposes of Title VII Fee-Shifting

The Second Circuit based its affirmance of the district court, in part, on the fact that Bridges was awarded certain damages under the New York Human Rights Law. That erroneous decision is at odds in principle with the apparent direction of other circuits on the notion of who constitutes a prevailing party.

It is well established that plaintiffs are not entitled to attorneys' fees under the New York Human Rights Law. As this Court has noted, "[t]he Human Rights Law of the State of New York does not authorize an award of counsel fees for work done in either state administrative or **judicial** proceedings." New York Gaslight Club, Inc. v. Carey, 447 U.S. 54, 67, n.7 (1980) (emphasis added).

The litigation of respondents' pendent New York State Human Rights Law claims constituted a state judicial proceeding, and, therefore any recovery in such proceeding, pursuant to New York law, is not subject to fee-shifting.[9]

That Bridges may have been awarded some small amount of compensatory damages under the New York Human Rights Law cannot in any way alter the fact that she failed to win any recovery on her Title VII claims. Indeed, "a plaintiff who loses on the merits of its federal civil rights claim is not a 'prevailing party' for purposes of an award of attorneys' fees . . . even if it prevails on a related pendent state law claim." National Org. for Women v. Operation Rescue, 37 F.3d 646, 653-654 (D.C. Cir. 1994); see also Bray v. Alexandria Women's Health Clinic, 506 U.S. 263, 285 (1993) ("[b]ecause respondents were not entitled to relief under [any federal civil rights statute], they were also not entitled to attorney's fees and costs"); Mateyko v. Felix, 924 F.2d 824, 828-29 (9th Cir.), cert. denied, 502 U.S. 814 (1991) ("[w]here, as here, there has been a decision adverse to plaintiff on the [federal civil rights] claim, section 1988 does not authorize the award of attorney's fees"); Albright v. Good Shepherd Hosp., 901 F.2d 438, 440 (5th Cir. 1990)

---

[9] See Paz v. Long Island R.R., No. 99-CV-557, 1997 U.S. Dist LEXIS 1408, at * 3-5 (E.D.N.Y. February 12, 1997) (reference to actions or proceedings "under this title" in § 2000e-5(k) refers to suits or proceedings alleging violation of Title VII, and not those under N.Y. Human Rights Law).

(where plaintiff loses on federal civil rights claim and only possible basis for recovery is state law, there are no grounds for attorneys' fee awards); Kelly v. Leesville, 897 F.2d 172, 177 (5th Cir. 1990) (fee-shifting statute does not authorize an award of fees to a party who recovers on pendent state claim but loses on civil rights claim). Indeed, this Court has noted that when no relief can be awarded pursuant to a federal civil rights statute, no attorney's fees can be awarded under § 1988. National Private Truck Council v. Oklahoma Tax Comm'n, __ U.S. __ , 115 S.Ct. 2351 (1995).

Adhering to this Court's holding in Farrar, a number of circuit courts have correctly held that even where a plaintiff on a federal rights claim receives nominal damages, the only reasonable fee is usually no fee at all. See Milton v. Des Moines, 47 F.3d 944 (8th Cir. 1995), cert. denied, __ U.S. __, 116 S. Ct. 87 (1995) (affirming denial of attorneys' fees where plaintiff recovered $1.00 in damages); see also Romberg v. Nichols, 48 F.3d 453 (9th Cir. 1995) (holding that plaintiffs who were each awarded $1.00 after having sought $2 million dollars "are a perfect example of plaintiffs who 'should receive no attorney's fees at all'"); Cramblit v. Fikse, 33 F.3d 633 (6th Cir. 1994) (holding that an award of nominal damages indicates that plaintiff failed to prove actual, compensatory injury, and affirming denial of fees); Cartwright v. Stamper, 7 F.3d 106 (7th Cir. 1993) (reversing award of fees where plaintiff awarded nominal damages on federal claim).

Bridges recovered no damages whatsoever, not even nominal damages on her Title VII claim. (A-12). However, even if there had been any recovery of nominal damages, this Court has ruled:

> In a civil rights suit for damages, however, the awarding of nominal damages also highlights the plaintiff's failure to prove actual, compensable injury.
>
> * * *

> When a plaintiff recovers only nominal damages because of his failure to prove an essential element of his claim for monetary relief, the only reasonable fee is usually no fee at all.

Farrar, 506 U.S. at 115 (citations omitted).

Since only a prevailing party may recover attorneys' fees in a civil rights action, and Bridges is not such a prevailing party, the award of fees was improper, and the issue is one which calls for the guidance of this Court.

4. THERE IS A PRESSING NEED FOR A RULING BY THIS COURT

The issues presented in this case have potential consequences that reach far beyond the litigation of this case in New York City. The issues touch on the interpretation and application of Title VII at a time when claims under the statute have risen dramatically.

In essence, Title VII's fee-shifting provision embodies a recognition that fee awards will act as an inducement to the filing of lawsuits. In practical terms, it is inevitable that such a fee-shifting statute will serve to encourage whatever types of lawsuits it rewards. If only private relief is sought and little is obtained, with no real hope of a change in circumstances otherwise, and yet fees are shifted to the defendant, the result "turns § 1988 (and also § 2000e-5(k)) into a relief Act for lawyers." Riverside, 477 U.S. at 588 (Rehnquist, J., dissenting). There is a distinct danger in such cases that fee awards based on litigation that ultimately failed in its intended purpose will result in windfalls to plaintiffs' attorneys and may invite ever-increasing litigation of questionable claims. In order to avoid this result, this Court held in Hensley that the fee award for a partially successful plaintiff must be "reasonable in relation to the results obtained," 461 U.S. at 440, and that "the most critical factor" in determining the amount of the award "is the degree of success

obtained." Id. at 436. Emphasis on the degree of the plaintiff's success ensures that fees will be awarded only to the extent that a plaintiff has vindicated some important public policy.

In Christiansburg Garment Co. v. E.E.O.C., 434 U.S. 412 (1978), this Court suggested that awarding fees only to prevailing plaintiffs would not in itself be an incentive for plaintiffs to bring claims that have little chance of success. 434 U.S. at 422. For the plaintiff who is deemed "prevailing" even though he or she has achieved limited success, however, this rationale will be true only if there is a requirement of some reasonable degree of proportionality between the amount of the fee award and the relief obtained.

A plaintiff's attorney knows that succeeding on any significant federal civil rights claim and achieving some of the benefit sought will qualify the plaintiff as a "prevailing party" and in most cases will entitle the plaintiff to some amount of attorney's fees. Garland, 489 U.S. at 789. However, if there is a possibility that the court may award fees even for cases whose sole result is a limited recovery on a Title VII claim or an award on a pendent state claim, there will be a strong incentive for the attorney to bring such cases despite the possibility that they will not result in any material success for the client. The attorney may be willing to gamble that a jury will bring in at least a favorable liability finding, and that the trial court will award fees based on all of the time spent on the case. That is precisely what the district court in the instant case did in awarding respondents' attorneys a substantial windfall for their limited success. A requirement that the amount of the fee award must bear some reasonable relationship to the plaintiff's degree of success would remove any incentive to bring lawsuits where no public interest is at stake or where merit is lacking.

While suits to recover money alone are permitted under the law, they do not necessarily make the plaintiff a "private attorney general" acting in the public interest. If in such cases, plaintiffs'

attorneys know that the only result necessary to win a substantial fee is a small damages award, it may be expected that, they will pursue these claims regardless of the prospect for success, rather than making an initial reasoned determination of the likelihood of success on the merits. By threatening to litigate such claims, plaintiffs can exert pressure on employers either to accept an inflated settlement demand or to litigate the matter at significant expense as respondents did in this case. Employers in the Second Circuit are, therefore, in the unenviable position of having to play Russian Roulette and hoping that, after costly and time-consuming litigation, if a plaintiff is awarded anything, it is $1.00 or less.

Generally, public policy does not favor coerced settlements or unnecessary litigation. The area of civil rights is no exception. Indeed, Title VII reflects the public policy favoring voluntary settlement of civil rights matters through negotiation and conciliation.[10] An interpretation of the counsel fees provision which awards fees only for services in reasonable relation to plaintiffs' success fully satisfies the public policy of encouraging meritorious claims by victims of discrimination. Moreover, it does this without offering an inducement for expanded litigation that would interfere with the desirable process of settlement negotiations. Indeed, empowered with the luxury of knowing that their fees will be paid in many instances, plaintiffs are free to make exorbitant settlement demands that, in effect, give employers no option but to litigate the claim.

---

[10] See Carson v. American Brands, Inc., 450 U.S. 79, 88, n.14 (1981) ("In enacting Title VII, Congress expressed a strong preference for encouraging voluntary settlement of employment discrimination claims.").

The need for uniform application of this Court's rulings in all of the circuits coupled with the profound and timely social issues raised by this case together suggest that this Court should grant certiorari.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the order of the United States Court of Appeals for the Second Circuit.

Respectfully submitted,

Mark A. Gerard
Counsel of Record
Thomas G. Dignan
NIXON, HARGRAVE, DEVANS
& DOYLE LLP
Clinton Square
P.O. Box 1051
Rochester, N.Y. 14603-1051
(716) 263-1000
Counsel for Petitioner

March 1997

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

- - - - - - -

Nos. 334, 908 August Term, 1996

(Argued: November 12, 1996 Decided 12/10, 1996)

Docket Nos. 96-7220, 96-7250

Stamp: UNITED STATES COURT OF APPEALS
FILED DEC 10 1996
COURT -------- CLERK

SUSAN Q. BRIDGES; VIRGINIA D'APONTE; and KIMBERLY MURYASZ,

Plaintiffs-Appellees-Cross-Appellants,

-v.-

EASTMAN KODAK COMPANY; THOMAS A. WALKER; JOHN KUCIK; MICHAEL FRENCH; KEVIN CASH; MARY HEAPHY; and DAVID OFFENHARTZ, as Supervisors, Agents, and Employees of Eastman Kodak Company,

Defendants,

YOURDON, INC.,

Defendant-Appellant-Cross-Appellee.

Before: OAKES, McLAUGHLIN, and CABRANES, Circuit Judges.

Plaintiffs — successful on their Title VII action in the United States District Court for the Southern District of New York (Carter, J.) — moved for attorney's fees and costs pursuant to 42 U.S.C. § 2000e-5(k). The district court awarded Plaintiffs most of their requested fees. Defendant now appeals, challenging the award on various grounds. Plaintiffs cross-appeal, challenging the district court's reduction of their requested amount.

AFFIRMED.

MARK A. GERARD, Nixon, Hargrave, Devans & Doyle, Garden City, NY (Thomas G. Dignan, Nixon, Hargrave Devans & Doyle, Garden City, NY, of counsel), for Defendant-Appellant-Cross-Appellee.

LAWRENCE SOLOTOFF, Solotoff & Solotoff, Great Neck, NY (Cheryl E. Solotoff, Henry S. Kramer, Solotoff & Solotoff, Great Neck, NY, of counsel), for Plaintiffs-Appellees-Cross-Appellants.

(Richard T. Seymour, Lawyers' Committee for Civil Rights Under Law, Washington, DC; Judith L. Lichtman, Donna R. Lenhoff, Helen L. Norton, Women's Legal Defense Fund, Washington, DC, submitted a brief for amici curiae Lawyers' Committee for Civil Rights Under Law, and Women's Legal Defense Fund.)

McLAUGHLIN, Circuit Judge:

The United States District Court for the Southern District of New York (Robert L. Carter, Judge), awarded Susan Bridges, Virginia D'Aponte and Kimberly Muryasz ("Plaintiffs") substantial attorney's fees and costs following their successful Title VII (and related state law) action against Yourdon, Inc. ("Yourdon"). See Bridges v. Eastman Kodak Co., No. 91 Civ. 7985, 1996 WL 43704 (S.D.N.Y. Feb. 6, 1996). Yourdon now appeals, arguing that the attorney's fees award is excessive and, with respect to Bridges, improper. Plaintiffs cross-appeal, challenging the district court's reduction of their requested amount.

BACKGROUND

Plaintiffs worked at Yourdon, where their male co-workers subjected them to frequent foul and sexist language and lewd gestures. Eventually, the three women quit. They then sued Yourdon, Eastman Kodak Company, and several individuals in the United States District Court for the Southern District of New York, under Title VII of the Civil Rights Act of 1964, see 42 U.S.C. § 2000e ("Title VII"), and the New York Human Rights Law, see N.Y. Exec. Law § 296(1) (a) ("Human Rights Law"), alleging both "hostile environment" and "quid pro quo" sexual harassment. Plaintiffs sought many millions of dollars in damages.

The court held a jury trial on Plaintiffs' state claims, and a (concurrent) bench trial on their Title VII claims. The jury: (1) awarded Bridges $11,214.64 in back pay and $20,000.00 in compensatory damages, but then subtracted the entire $11,214.64 of back-pay because she had failed to mitigate damages, resulting in a total award to Bridges of $20,000.00; (2) awarded D'Aponte $12,043.61 in back pay and $25,000.00 in compensatory damages, totaling $37,043.61; and (3) awarded Muryasz $10,385.66 in back pay and $50,000.00 in compensatory damages, totaling $60,385.66.

The court echoed the jury's findings with respect to Plaintiffs' Title VII claims, finding that each of the women had been sexually harassed as defined by federal law. The court found Yourdon liable under Title VII for D'Aponte's and Muryasz's back-pay — totalling $22,429.77 — but did not actually award any further monetary relief to avoid a double recovery (because Plaintiffs had already collected back-pay under the New York Human Rights Law).

Plaintiffs moved for attorney's fees and costs pursuant to 42 U.S.C. § 2000e-5(k). They requested $1,185,569.30. The district court found that all three women were "prevailing parties" entitled to attorney's fees and costs. Adjusting for certain hours and tasks that the court found unchargeable, and slightly reducing Plaintiffs' attorneys' requested hourly rates, the court awarded Plaintiffs

$753,2[illegible].99 in attorney's fees and costs.

Yourdon now appeals, arguing that the district court erred in: (1) holding that Bridges was eligible at all for attorney's fees and costs; (2) failing to reduce the attorney's fees award for Plaintiffs' limited success; and (3) failing to reduce the award for further excessive hours and tasks. The Plaintiffs cross-appeal, arguing that the district court improperly reduced the amount of their attorney's fees and costs. We affirm across the board, and write only to address Bridges' eligibility for attorney's fees and costs.

DISCUSSION

To be eligible for attorney's fees and costs under § 2000e-5(k), a plaintiff (or a defendant) must be a "prevailing party." 42 U.S.C. § 2000e-5(k); see also Lyte v. Sara Lee Corp., 950 F.2d 101, 103 (2d Cir. 1991). A plaintiff prevails when she "succeeds 'on any significant issue in litigation which achieves some of the benefit the part[y] sought in bringing suit.'" Carroll v. Blinken, 42 F.3d 122, 129 (2d Cir. 1994) (alteration in original) (quoting Farrar v. Hobby, 506 U.S. 103, 109 (1992)[1]); see also Marbley v. Bane, 57 F.3d 224, 234 (2d Cir. 1995). A plaintiff "succeeds" — and hence "prevails" — "when actual relief on the merits of [her] claim materially alters the legal relationship between the parties by modifying the defendant's behavior in a way that directly benefits the plaintiff." Farrar, 506 U.S. at 111-12; see also Texas State Teachers Ass'n v. Garland Indep. Sch. Dist., 489 U.S. 782, 792-93 (1989) ("[t]he touchstone of the prevailing party inquiry must be the material alteration of the legal relationship of the parties in a

---

[1] In Farrar, the Supreme Court dealt not with § 2000e-5(k), but with the Civil Rights Attorney's Fees Awards Act of 1976, see 42 U.S.C. § 1988. But, Congress intended that § 2000e-5(k) and § 1988 follow similar standards. See S. Rep. No. 1011, 94th Cong., 2d Sess. 3-4, reprinted in 1976 U.S.C.C.A.N. 5908, 5912; see also Walker v. Anderson Elec. Connectors, 944 F.2d 841, 846 n.10 (11th Cir. 1991). Cases decided under § 1988 (and other similar attorney's fees provisions) "'therefore are authoritative in the Title VII context,'" Reed v. A.W. Lawrence & Co., 95 F.3d 1170, 1183 n. 16 (2d Cir. 1996 (quoting Lyte, 950 F.2d at 103); see also Hensley v. Eckerhart, 461 U.S. 424, 433 n.7 (1983).

manner which Congress sought to promote"); Carroll, 42 F.3d at 129.

We are aware that a plaintiff pressing federal civil rights claims often combines these claims with related state-law claims. This results in many permutations and combinations of relief. The plaintiff may succeed on all, some, or none of her federal claims, while succeeding on all, some, or none of her state claims. On each winning claim, the plaintiff may achieve several forms of relief (e.g., money damages, nominal damages, injunctions compelling or preventing certain future action, or declaratory relief). Accounting for full or partial settlement alternative holdings, and reversals on appeal, it often becomes difficult to discern when a plaintiff has "prevailed."

It seems to be settled that "a plaintiff who loses on the merits of [her] federal civil rights claim is not a 'prevailing party' for purposes of an award of attorney's fees . . . even if [she] prevails on a related pendent state law claim." National Org. for Women v. Operation Rescue, 37 F.3d 646, 653-54 (D.C. Cir. 1994) (emphasis added); see also Kelly v. City of Leesville, 897 F.2d 172, 177 (5th Cir 1990).

Bridges, however, has not lost on the merits of her federal claim. Rather, she has secured: (1) a favorable judgment on the merits — but no damages because of her failure to mitigate — under Title VII; and (2) a favorable judgment on the merits, and substantial damages, under the New York State Human Rights Law. We conclude that this constitutes sufficient success to make Bridges a "prevailing party" eligible for attorney's fees and costs under § 2000e-5(k).

In Milwe v. Cavuoto, 653 F.2d 80 (2d Cir. 1981), we held that a plaintiff who received only nominal damages on her federal constitutional claim, but substantial damages on a related state-law assault claim, was eligible for attorney's fees on the basis of her state-law-claim success. Milwe, 653 F.2d at 84. Distinguishing Milwe in a later case, see Russo v. State of New York, 672 F.2d 1014 (2d Cir. 1982) — where the plaintiff had won damages on a

state-law malicious prosecution claim, but lost on his federal civil rights claims — we noted that "[t]he important point about Milwe is that the civil rights issue was heard and decided in plaintiff's favor." Id. at 1022 n.5.

Here, Bridges' federal civil rights claim was heard, and it was decided in her favor. She also won a substantial monetary award under her related state-law claim. That is to say, she obtained "relief on the merits of [her] claim[s]" which, by compelling Yourdon to pay actual damages, "materially alter[ed] the legal relationship between the parties," Farrar, 506 U.S. at 111-12, and through which she has "achieve[d] some of the benefit [she] sought in bringing suit," id. at 109. Bridges is therefore a "prevailing party" eligible for attorney's fees and costs. See Aubin v. Fudala, 782 F.2d 287, 290-91 (1st Cir. 1986); Williams v. Thomas, 692 F.2d 1032, 1036 (5th Cir. 1982).

In arguing that Bridges is not a prevailing party, Yourdon relies heavily on Farrar's statement that "a judicial pronouncement that the defendant has violated the [plaintiff's rights], unaccompanied by an enforceable judgment on the merits, does not render the plaintiff a prevailing party. Of itself, 'the moral satisfaction [that] results from any favorable statement of law' cannot bestow prevailing party status." Farrar, 506 U.S. at 112-13 (quoting Hewitt v. Helms, 482 U.S. 755, 762 (1987) (alteration in original)). We find this caution from Hewitt inapposite. First, Bridges has obtained more than Hewitt's "interlocutory ruling" (later lost in the course of litigation resulting in a judgment against the plaintiff). See Hewitt, 482 U.S. at 760. Indeed, she has obtained exactly what the Hewitt Court called for: an actual favorable judgment requiring Yourdon to pay damages. Second, neither Farrar nor Hewitt dealt with a plaintiff who had achieved substantial success — and a large monetary award — on pendent state-law claims.

Yourdon also believes that the district court should have reduced the attorney's fees award for Plaintiffs' limited success. See Hensley v. Eckerhart, 461 U.S. 424, 436 (1983). And, both

Yourdon and Plaintiffs take issue with the district court's reductions in Plaintiffs' requested amount.[2] We have reviewed the judgment and the record (which reveals the lengthy and contentious history of the litigation), and have considered all the arguments raised by the parties. We find that the district court did not abuse its discretion in any respect. See Hensley, 461 U.S. at 437 ("the district court has discretion in determining the amount of a fee award" because of its "superior understanding of the litigation and the desirability of avoiding frequent appellate review of what essentially are factual matters"); American Fed'n of State, County and Mun. Employees v. County of Nassau, 96 F.3d 644, 650 (2d Cir. 1996).

CONCLUSION

We find that Bridges is a "prevailing party" eligible for attorney's fees under § 2000e-5(k). The judgment of the district court is AFFIRMED.

---

[2] The district court reduced Plaintiffs' requested amount in part to reflect: excessive hours; duplication of efforts; clerical and administrative tasks; travel time; time spent cancelling depositions and requesting extensions; and excessive legal research. Over Yourdon's objections, the court allowed time spent on matters concerning non-appearing defendants, and time spent on state law claims. The court also reduced Plaintiffs' attorneys' requested hourly rate. See Bridges, 1996 WL 47304 at *3-12.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

SUSAN Q. BRIDGES; VIRGINIA D'APONTE, and KIMBERLY MURYASZ,
Plaintiffs,
-against-

CORRECTED OPINION
91 Civ. 7985 (RLC)

EASTMAN KODAK COMPANY, YOURDON, INC.,THOMAS A. WALKER, JOHN KUCIK, MICHAEL FRENCH, KEVIN CASH, MARY HEAPHY, and DAVID OFFENHARTZ as Supervisors, Agents, and Employees of Eastman Kodak Company, and Yourdon, Inc. (A Kodak Company),
Defendants.

APPEARANCES

SOLOTOFF & SOLOTOFF
Attorneys for Plaintiffs
P.O. Box 4686
35 Clover Drive
Great Neck, New York 11023

LAWRENCE SOLOTOFF
Of Counsel

NIXON, HARGRAVE, DEVANS & DOYLE
Attorneys for Defendants
Eastman Kodak Company, Yourdon, Inc., Thomas J. Walker, John Kucik, and Michael French
990 Stewart Avenue
Garden City, New York 11530

THOMAS G. DIGNAN
Of Counsel

JASPAN, GINSBERG, SCHLESINGER,
SILVERMAN & HOFFMAN
Attorneys for Defendant Kevin Cash
300 Garden City, New York 11530

STANLEY A. CAMHI
Of Counsel

CARTER, District Judge

I. Background

Plaintiffs filed suit under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq., and the New York Human Rights Law, N.Y. Exec. Law § 296(1)(a) (McKinney 1993), alleging quid pro quo sexual harassment and the creation of a hostile work environment. For extensive factual and procedural background, see Bridges v. Eastman Kodak Co., 68 Fair Empl. Prac. Cas. 1587 (S.D.N.Y. 1985) (Carter, J.); Bridges v. Eastman Kodak Co., No. 91 Civ. 7985, 1995 WL 23587 (S.D.N.Y. Jan. 20, 1995) (Carter, J.) Bridges v. Eastman Kodak Co., 850 F. Supp. 216 (S.D.N.Y. 1994) (Carter, Jr.); Bridges v. Eastman Kodak Co., 833 F. Supp. 1020 (S.D.N.Y. 1993) (Carter, J.); Bridges v. Eastman Kodak Co., 800 F. Supp. 1172 (S.D.N.Y. 1992) (Carter, J.).

Plaintiffs' state law claims were tried before a jury from January 23, 1995, through February 9, 1995. The jury found defendant Cash guilty of hostile work environment sexual harassment. Defendants Yourdon and Kodak were also found liable for sexual harassment on the part of their employee Cash. The jury awarded plaintiff Bridges $11,214.64 in back pay and $20,000 in compensatory damages but subtracted $11,214.64 for her failure to mitigate damages. Plaintiff D'Aponte was awarded $12,043.61 in back pay and $25,000 in compensatory damages, and plaintiff Muryasz was awarded $10,385.66 in back pay and $50,000 in compensatory damages.

The court issued an opinion on September 7, 1995, addressing plaintiffs' Title VII claims. Bridges, 68 Fair Empl. Prac. Cas. 1587. The court found defendant Yourdon, but not defendants Cash and

Kodak, liable for back pay under Title VII.[1]

Plaintiffs now timely move pursuant to Rules 52(b) and 59(e), F.R. Civ. P., for the court to "Review; Amend; Modify or Clarify" its opinion of September 7, 1995.[2] The widely divergent interpretations of the court's opinion displayed in the parties' briefs on this matter point out the necessity for a clarification. The court also takes this opportunity to rule on the previously undetermined issue of plaintiffs' request for pre-judgment interest, costs (including attorneys' fees), and expenses.

II. Back pay award

The court clarifies its opinion of September 7, 1995, to stress that it has adopted the jury's findings of fact made under New York Human Rights Law, with one exception. To summarize, the court held that defendant Yourdan was liable under Title VII for hostile environment sexual harassment committed by defendant Cash. Defendant Cash himself was not found liable under Title VII because the federal back pay claim against him had been dismissed in an order issued February 14, 1995. The court departed from the jury's findings only to the extent that the jury found Kodak liable for Cash's actions. Because this finding did not comport with the law, the court declined to follow it. Thus, Kodak is not liable under Title VII.

Having prevailed on certain of their Title VII claims and their state law claims, then, plaintiffs D'Aponte and Muryasz are entitled

---

[1] The court had previously granted defendant Cash's motion to dismiss plaintiffs' Title VII back pay claims against him, by an order dated February 14, 1995.

[2] Defendants, apparently unfamiliar with the Federal Rules of Civil Procedure, contend that plaintiffs' motion is untimely because it was filed more than 10 days following the entry of the judgment. Under Rules 52(b) and 59(e), F.R. Civ. P., parties must move to alter or amend a judgment no more than 10 days from the date of entry. The court's opinion is dated September 7, 1995; plaintiffs' motion was filed September 20. Plaintiffs are timely: by the terms of Rule 6(a), F.R. Civ. P., "[w]hen the period of time prescribed or allowed is less than 11 days, intermediate Saturdays, Sundays, and legal holidays shall be excluded in the computation."

to back pay under both Title VII and New York Exec. Law § 296, as well as compensatory damages under New York Exec. Law § 296. They may not recover double the amount of their back pay, however. The total amount due each plaintiff under the two statutes, then, is the following:

Bridges:	$20,000 in compensatory damages
D'Aponte:	$12,043.61 in back pay
	$25,000 in compensatory damage
Muryasz:	$10,385.66 in back pay
	$50,000 in compensatory damages.

III. Prevailing parties

The court's opinion of September 7, 1995, held that all three plaintiffs prevailed on their Title VII hostile work environment claims against defendant Yourdon. The court stresses that despite the fact that Bridges did not win back pay on her Title VII claim, she has nonetheless prevailed on the merits under the federal statute.

The Second Circuit abides by the United States Supreme Court precedent that

> [a] party who achieves only partial success in his or her suit may be considered to be a "prevailing party" where he or she "succeed[s] on any significant issue in litigation which achieves some of the benefit . . . sought in bringing suit."

Ruggiero v. Krzeminski, 928 F.2d 558, 564 (2d Cir. 1991), quoting Hensley v. Eckerhart, 461 U.S. 424, 433 (1983). Furthermore, "success may be assessed by examining whether plaintiffs can 'point to a resolution of the dispute which changes the legal relationship between [them] and the defendant[s].'" Ruggiero, 928 F.2d at 564, quoting Texas State Teachers Ass'n v. Garland Indep. School Dist., 489 U.S. 782, 792 (1989).

In the present case, the jury found Cash, Yourdon, and Kodak liable under New York law for sexual harassment against Bridges. Although Bridges's back pay award under New York law was subsequently reduced to zero because of her failure to mitigate

damages, she was awarded $20,000 in compensatory damages for the state law claims. She has thus succeeded in a significant issue in the litigation and has achieved a substantial part of the benefit sought in bringing the suit, meeting the Hensley standard.

Bridges cannot recover money damages on her Title VII claims: the court abides by the jury's determination that she failed to mitigate her back pay damages, and the court lacks the power in this case to award compensatory damages under Title VII. See Bridges, 850 F. Supp. at 219. Bridges has recovered on her state claims, however, which involve a common core of facts and similar legal theories to the Title VII causes of action. Furthermore, the court held that Bridges had been subjected to sexual harassment as defined by Title VII. Since Bridges has established that she was, in fact, sexually harassed, both under state law and under Title VII, it follows that the legal relationship between her and defendant Yourdan has been significantly altered. Bridges thus qualifies as a prevailing party under Title VII.[3]

The cases defendants cite in support of their argument are inapposite. They uniformly stand for the proposition that a plaintiff may not recover attorneys' fees for a losing Title VII claim. Unlike those cases, here plaintiff has not been rejected on the merits. She succeeded in significant aspects of the litigation: she was awarded the not insubstantial amount of $20,000 and she was found to have been subjected to sexual harassment under the terms of Title VII.

---

[3] One way of indicating that Bridges is indeed a prevailing party would be to award her nominal damages of $1. The Second Circuit has "directed lower courts to award nominal damages when substantive constitutional rights had been violated but no compensatory damages had been proved." Ruggiero v. Krzeminski, 928 F.2d at 563. However, it is not clear whether the court may award nominal damages under Title VII. At least one district court in this circuit has held that nominal damages are compensatory in nature; thus, courts lacking the power to grant compensatory damages would also lack the power to grant nominal damages. McLaughlin v. New York, 784 F. Supp. 961, 979 (N.D.N.Y. 1992). The Second Circuit has not spoken on the issue. Since I believe that I need not award nominal damages to Bridges in order to clarify her position as a prevailing party, I will not address this issue in the present case.

One final line of case law must be addressed, although defendants do not raise it. The Eleventh Circuit, in Walker v. Anderson Electrical Connectors, 944 F.2d 841 (11th Cir. 1991), cert. denied, --U.S.--, 113 S. Ct. 1043 (1993), denied attorneys' fees to a Title VII plaintiff who was deemed to have been sexually harassed but was awarded no damages. The court held that a jury's finding of sexual harassment, "without more, will not ordain a litigant the prevailing party." Id. at 847. In reaching this conclusion, the court claimed to be bound by two United States Supreme Court cases, Hewitt v. Helms, 482 U.S. 755 (1987), and Rhodes v. Stewart, 488 U.S. 1 (1988) (per curiam). The court finds Hewitt and Rhodes distinguishable from the present case, and declines to follow the Eleventh Circuit's extension of their holdings.

In Hewitt, a judicial determination that the plaintiff's rights had been violated was deemed inadequate to support an award of fees. There, however, the plaintiff's due process claim did not prevail; it was ultimately dismissed on a summary judgment motion. The judicial determination that a violation had occurred was made by the appellate court as one step in a tortuous procedural history. Following that determination, the district court, on remand, dismissed the claim. Accordingly, the Court's holding was rather narrow: "a favorable judicial statement of law in the course of litigation that results in judgment against the plaintiff does not suffice to render him a 'prevailing party.'" Hewitt, 482 U.S. at 763 (emphasis added).

The Eleventh Circuit extended the holding of Hewitt to apply to a situation, like the present, in which a jury found that the plaintiff had been subjected to sexual harassment. This reasoning is clearly beyond the bounds of Hewitt's narrow reach.

Similarly, Rhodes v. Stewart does not directly address the issues raised by this case and does not compel the result reached by the Eleventh Circuit. In Rhodes, two inmates challenged a decision by prison officials that denied them permission to subscribe to a magazine. The plaintiffs prevailed, but by the time the district court ruled in their favor, one had died and the other had been released

from custody. The Supreme Court held that despite the fact that plaintiffs had won a declaratory judgment, they were not "prevailing parties" entitled to an award of attorneys' fees:

> The case was moot before judgment issued, and the judgment therefore afforded the plaintiffs no relief whatsoever. In the absence of relief, a party cannot meet the threshold requirement . . . that he prevail, and in consequence he is not entitled to an award of attorney's fees.

Rhodes, 488 U.S. at 4. The judgment in this case was more than a hollow pronouncement over a moot case. The jury awarded Bridges a substantial sum in compensatory damages on her state law claims, and the court vindicated her rights by finding her to have been illegally subjected to hostile work environment sexual harassment under federal statutory law. Bridges has prevailed under Title VII.

IV. Attorneys' fees

Having prevailed on certain of their Title VII claims, plaintiffs are entitled to litigation costs, including attorneys fees. 42 U.S.C. § 2000e-5(k). Plaintiffs have submitted documentation detailing upwards of 4,600 hours spent on the case over the course of nearly five years. They request a total of $1,185,569.30 in fees and expenses. Defendants respond with numerous and lengthy arguments to reduce the amount to be awarded.

The amount of attorneys' fees awarded under Title VII is within the discretion of the district court. Hensley v. Eckerhart, 461 U.S. at 437; Clarke v. Frank, 960 F.2d 1146, 1153 (2d Cir. 1992). In calculating a fee award, the court begins by multiplying the hours counsel has reasonably spent on the case by a reasonable hourly rate. Hensley, 461 U.S. at 433; Cohen v. West Haven Bd. of Police Commissioners, 638 F.2d 496, 505 (2d Cir. 1980); Burr v. Sobol, 748 F. Supp. 97, 99 (S.D.N.Y. 1990) (Carter, J). The resulting "lodestar" figure is then subject to downward or upward adjustments, depending on a variety of factors. Burr, 748 F. Supp. at 99-100. The United States Supreme Court has noted that courts

may consider the following factors in making a fee determination:

(1) the time and labor required;

(2) the novelty and difficulty of the questions;

(3) the skill requisite to perform the legal service properly;

(4) the preclusion of employment by the attorney due to acceptance of the case;

(5) the customary fee;

(6) whether the fee is fixed or contingent;

(7) time limitations imposed by the client or the circumstances;

(8) the amount involved and the results obtained;

(9) the experience, reputation, and ability of the attorneys;

(10) the "undesirability" of the case;

(11) the nature and length of the professional relationship with the client; and

(12) awards in similar cases.

Hensley, 461 U.S. at 430 n.3.[4] Even if they are not specifically mentioned in this opinion, the court has carefully considered each of these factors in coming to its decision on attorneys' fees.

It is important to note at the outset that courts should not "become enmeshed in a meticulous analysis of every detailed facet of the professional representation." Seigal v. Merrick, 619 F.2d 160, 164 n.8 (2d Cir. 1980), quoting Lindy Bros. Builders, Inc. v. American Radiator & Standard Sanitary Corp, 540 F.2d 102, 116

[4] Although Hensley and other cases cited in this opinion deal with fee awards under 42 U.S.C. § 1988 , case law and standards developed under that statute are generally applicable to fee determinations under Title VII. As the Supreme Court stated in Hensley:

[t]he legislative history of § 1988 indicates that Congress intended that "the standards for awarding fees be generally the same as under the fee provisions of the 1964 Civil Rights Act [including Title VII]" . . . The standards set forth in this opinion are generally applicable in all cases in which Congress has authorized an award of fees to a "prevailing party."

461 U.S. at 433 n.7 (citation omitted).

(3d Cir. 1976). As this court has held, it is

> less important that judges attain exactitude (which may be impossible) than that they use their experience with the case, as well as their experience with the practice of law, to assess the reasonableness of the hours spent and the rates charged in a given case.

Bowne of New York City, Inc. v. AmBase Corp., 161 F.R.D. 258, 267 (S.D.N.Y. 1995) (Carter, J.), citing Clarke v. Frank, 960 F.2d 1146, 1153 (2d Cir. 1992).

A. Hours

The court's first step is to determine the reasonableness of the hours billed by plaintiffs' counsel. As a threshold matter, defendants appear to attack plaintiffs' time records on the grounds that they are not contemporaneous. The Second Circuit requires attorneys applying for court-ordered fees to submit contemporaneous time records. New York Ass'n for Retarded Children, Inc. v. Carey, 711 F.2d 1136, 1148 (2d Cir. 1983). Documents printed from computer records are acceptable, however, provided the information was entered into the computer contemporaneously. Cruz v. Local Union No. 3 of Int'l B'hood of Elec. Workers, 34 F.3d 1148, 1160 (2d Cir. 1994). Here, plaintiffs offer records compiled by means of a software program called "Timeslips." According to plaintiffs' counsel, each attorney or paralegal enters information concerning the task undertaken and the time spent on it within 24 hours of that work. These records are then printed out en masse for submission to the court. This system seems dependable and well within the dictates of Cruz. I am perplexed by defendants' challenge, as they fail to explain exactly what is objectionable about this system. There will be no reduction in hours for failure to keep contemporaneous records.

1. Insufficiently specific and merged billing entries

Defendants next challenge plaintiffs' time records on the grounds that plaintiffs have merged different tasks under single time entries, and that these entries provide overly vague

descriptions of the time spent. The Second Circuit has held that time records must at a minimum "specify, for each attorney, the date, the hours expended, and the nature of the work done." Carey, 711 F.2d at 1148. This information enables the court to determine the need for such work and the reasonableness of the time spent on it. Plaintiffs need not describe in meticulous detail the particularities of every task, however. As the United States Supreme Court has noted, "[p]laintiff's counsel, of course, is not required to record in great detail how each minute of his time was expended. But at least counsel should identify the general subject matter of his time expenditures." Hensley, 461 U.S. at 437 n.12. In Burr, the court found that the defendant's challenges to the plaintiffs' time records were "overly critical":

> [r]ather than looking at the big picture to see if the total time expended for each portion of this case was reasonable, defendant looks at each individual entry, and even individual parts of entries, in an attempt to determine if each one is itself reasonable. Courts have recognized that this is an unrealistic approach and should be discouraged. . . . Although some of plaintiff's time records could have been better kept — a fact not surprising given the volume of time records for a case of this size — overall they are sufficiently detailed to allow the court to assess the reasonableness of the time spent.

Burr, 748 F. Supp. at 100 (citation omitted).

The above description holds for the present case as well. Defendants are correct that plaintiffs occasionally provide vague descriptions of their work and tend to merge more than one task into some of their time entries. The time records overall, however, afford the court sufficient opportunities to evaluate the reasonableness of each task and the time expended on it. There will be no across-the-board reduction for lack of specificity.

2. Excessive hours

Defendants' next general objection is that plaintiffs' attorneys document grossly excessive hours. They allege that plaintiffs billed 31.25 hours for drafting the complaint, 50.5 hours for composing

the opening statement, 167.5 hours for preparing the summation, 244.5 to 314 hours for deposition preparation, and 374.25 hours between February 10, 1995,and April 3, 1995, for drafting the proposed Findings of Fact and Conclusions of Law and the fee application.

The court has thoroughly examined defendants' arguments, plaintiffs' responses, and the time sheets in question. It is unnecessary to go into detail on each contested issue. Generally, defendants have sought to bolster their arguments by adding together blocs of time in which several tasks were accomplished under a single heading. Thus, to get a figure of 167.5 hours spent by plaintiffs' counsel in preparing for summation, defendants have apparently added together the full time allotted entries such as "Trial preparation; preparation for summary" and "Preparation for trial. Preparation of summary and jury instruction regarding missing witness." This is not a valid approach. Clearly, plaintiffs' counsel did not spend the entire time for each of those entries working on the summation. To some extent, plaintiffs have invited such willful misunderstandings by their failure to provide separate time entries for each task. However, the court adheres to its standard as stated above and evaluates the fee application in its entirety for reasonableness of time expenditures.

The court does find that plaintiffs' attorneys' time billed for work done prior to the actual trial is somewhat excessive. A thorough review of the record reveals an expenditure of several thousand hours on discovery, motion practice, depositions, and the like. The court deems this to be somewhat more than a reasonable expenditure of time on these matters. In the court's opinion, plaintiffs' counsel have occasionally been inefficient in their use of time; furthermore, they have expended many hours getting up to speed on matters which as more experienced counsel they should have been able to accomplish more quickly. Defendants should not have to pay for such time. Accordingly, the court will reduce plaintiffs' attorneys' hours by 10% across the board. Besides trimming the fat off of the fee application, this reduction will account for any minor contested issues between the parties.

A few areas call for more individualized attention. In examining the time billed for preparation for the depositions of the three plaintiffs, the court's calculations yield the following figures: 107.25 hours in preparation for the deposition of Muryasz (in addition to 41.75 hours spent at the deposition); 99 hours in preparation for the deposition of Bridges (in addition to 49.5 hours spent at the deposition); and 85.25 hours in preparation for the deposition of D'Aponte (in addition to 58.5 hours spent at the deposition).[5] The court finds these numbers to be excessive. Accordingly, the court will deduct 75 hours each from Henry Kramer and Lawrence Solotoff, a deduction of approximately 50%.

Finally, defendants contest plaintiffs' time billed following the conclusion of the trial. The court calculates that plaintiffs claim in excess of 330 hours for work on their proposed Findings of Fact and Conclusions of Law. This amount is excessive. Since defendants should not be required to pay for hours the court deems unnecessary or excessive, 100 hours will be subtracted from Lawrence Solotoff's total of more than 200 hours and 50 hours will be subtracted from Cheryl Solotoff's total of 91.5 hours.

3. Duplication of effort

Defendants next argue that plaintiffs' counsel engaged in a duplication of effort. The Second Circuit has left determination of redundancy in fee applications to the discretion of the district court:

> prevailing parties are not barred as a matter of law from receiving fees for sending a second attorney to depositions or an extra lawyer into court to observe and assist. . . . Of course, a trial judge may decline to compensate hours spent by collaborating lawyers or may limit the hours allowed for specific tasks, but for the most part such decisions are best made by the district court on the basis of its own assessment of

---

5 These figures do not include travel time attached to these depositions nor travel time attached to the preparation for them, which is dealt with under the general discussion of travel billing.

> what is appropriate for the scope and complexity of the particular litigation.

Carey, 711 F.2d at 1146 (citation omitted). While it is true that redundant work should not be billed, many tasks in fact require or benefit from the attention of more than one attorney. Attendance at trial, in this case, was such a task. All three of plaintiffs' counsel attended the trial and billed for their time. The court finds nothing excessive or inappropriate about this billing. Attorneys seldom try cases alone; counsel for defendants certainly did not. While Cheryl Solotoff and Henry Kramer might not have examined or cross-examined witnesses or performed other visible trial functions, all three attorneys had roles to play in the success of this litigation. Their presence in the courtroom was in important aspect of their involvement in the litigation; the court will allow this time.

Attendance at depositions, however, is to some extent a different matter. Time spent in depositions is far less adversarial and not nearly so crucial to the success of the case as time spent in trial. Thus, "[w]hile the court recognizes that assistance at depositions is often necessary, generally that assistance is offered by an associate at a much lower rate." Carrero v. New York City Housing Authority, 685 F. Supp. 904, 908 (S.D.N.Y. 1988) (Sweet, J.), rev'd in part on other grounds, 890 F.2d 569 (2d Cir. 1989). Accordingly, the court will allow Lawrence Solotoff, as lead counsel, to bill at the full 1993-94 rates for attendance at depositions, but will allow Henry Kramer to bill at a lower rate of $200 per hour.

The court finds that other challenged instances of "duplicative efforts," such as conferences with the court and research time, constitute reasonable time expenditures for both attorneys involved. See, e.g., EEOC v. Local 638 and Local 28 of the Sheet Metal Workers' Int'l Ass'n, No. 71 Civ. 2877, 1991 WL 278917 at *2 (Dec. 18, 1991, S.D.N.Y.) (Carter, J.) ("having two attorneys research and participate in drafting a brief is a common practice and therefore not necessarily duplicative"). Furthermore, the time spent by two attorneys discussing the case with one another is properly billed. As the court noted in a similar situation,

for two attorneys "each to bill time for attending the same conference is obviously not duplicative, as the conference seems [to] have been a meeting between the two." Id.

4. Clerical and administrative tasks

Defendant's next argument is that plaintiffs occasionally bill clerical tasks at attorneys' rates. Defendants are correct that filing, delivery, and service of papers do not properly come under the heading of hours "expended on the litigation," and are not generally considered recoverable expenditures of time. Soc'y for Good Will to Retarded Children v. Cuomo, 574 F. Supp. 994, 999 (E.D.N.Y. 1983), vacated on other grounds, 737 F.2d 1253 (2d Cir. 1984). The reasoning behind this rule is that secretarial tasks are normally subsumed into an attorney's overhead expenses. See id. at 1002. Compensable expenses are those "which normally are charged separately to fee paying clients and which are not incorporated as part of office overhead into the attorney's billing rates." Americans United for Separation of Church and State v. School District of Grand Rapids, 717 F. Supp. 488, 503 (W.D. Mich. 1989).

Consequently, some time will be disallowed. Lawrence Solotoff billed 10 hours on 11/26/91 for the following: "Filed complaint; met with Muryasz and NBC conference with H. Kramer." Henry Kramer, similarly, billed 10 hours on 11/26/91 for "Complaint filing; meetings with K. Muryasz and NBC News; conference with L. Solotoff; telephone conference with Ms. Bridges and D'Aponte." These 20 hours will not be allowed: filing a complaint is an administrative task not requiring the attention of an attorney, much less two. Furthermore, time spent in a news conference is not appropriately included in a fee application. The United States Supreme Court has stated that time spent conducting press conferences may not be included in a fee application, since it does not qualify as time "expended on litigation." Soc'y for Good Will to Retarded Children v. Cuomo, 574 F. Supp. at 999 (approximately nine hours for communications with media disallowed). Although portions of the 20 hours might be allowable,

plaintiffs have failed to provide a specific enough breakdown for the court to determine what might be billed. Accordingly, the entire 20 hours will be subtracted from the total.

Likewise, several other administrative tasks performed by Lawrence Solotoff will be disallowed:

9/12/91	Right to Sue letter received and mailed to clients	1.0
10/2/92	Mailed documents prepared for application to Hon. Judge Carter	.5
8/5/93	Letter to Pratt Services re: billing error for transcript fees requested by defendants	.5
8/19/93	Deliver documents to counsel re: Kodak	1.5
10/6/93	Delivered and served brief	.5

Finally, because a fair amount of Cheryl Solotoff's time appears to have been spent on tasks such as "preparation of exhibits," "organization of exhibits," and "organization of documents," not tasks which ordinarily should be billed at full attorney's rates, her billed hours will be reduced by 10%.

5. Travel Time

Defendants challenge plaintiffs' counsels' travel time. They claim that plaintiffs bill for unnecessary and duplicative travel time.[6] Plaintiffs maintain the necessity of their travel hours, but offer to reduce this time by a total of 200 hours, 100 hours each for Lawrence Solotoff and Henry Kramer. This constitutes a reduction of approximately 50%.

---

6 Defendants particularly object to plaintiffs' attorneys' travel time to law libraries: "[i]f plaintiffs' attorneys have so much expertise as they claim in this area, it seems strange that they need to traverse the area to get to libraries so frequently." (Mem. of Law in Opp'n to Pls.' Application for Allowance of Att'ys' Fees and Expenses at 26.) The court does not endorse these rather childish sentiments. On the contrary, the court finds that time spent on legal research, particularly in complicated cases such as the present one, tends to hone legal skills and enhance the quality of work submitted by attorneys of any level.

It is within the court's power to grant full hourly rates for travel time. See Carrero, 685 F. Supp. at 909. However, as one court noted, "[t]he time . . . spent in transit may have been beneficial, but it probably was not as productive as time at the office or in court." Soc'y for Good Will to Retarded Children v. Cuomo, 574 F. Supp. at 998. Plaintiffs' attorneys expended a considerable amount of time travelling in the present case and, like the pretrial time generally, it was perhaps not an entirely necessary or efficient use of their hours. Accordingly, the court accepts plaintiffs' offer to reduce travel time and applies a further reduction of 50% to the remainder of the time. It is thus unnecessary to look into each challenge to specific travel time billed; the reductions account for any minor disputes.

6. Time spent cancelling depositions, requesting extensions

Defendants argue that plaintiffs have made a "flagrant attempt" to recover fees for time "frivolously" spent. Specifically, they contend that plaintiffs billed for time spent cancelling depositions and requesting extensions from the court. Plaintiffs, in response, charge defendants with using "Stalingrad defense" tactics which forced them to expend much time and energy responding to numerous motions, defending numerous depositions, responding to an overstaffed defense team, and reviewing irrelevant evidence presented as relevant. The court has no desire to enter the fray in order to apportion blame. In a few instances, it is clear that plaintiffs have billed for inappropriate time: On December 22, 1994, both Lawrence Solotoff and Henry Kramer billed for time spent on a deposition cancelled by their own deponent; the same is true again on January 2, 1995; and on February 24, 1992, September 29, 1992, and July 2, 1993, Lawrence Solotoff and Henry Kramer billed for time spent requesting extensions. However, the hours billed consist primarily of travel time, which the court will consider subsumed within the pro bono reduction in travel time offered by plaintiffs. The court will subtract a total of 10.75 hours from Lawrence Solotoff's time to account for the other inappropriate expenditures of time.

7. Non-appearing defendants and defendant Cash

Defendants challenge time plaintiffs' counsel spent on matters concerning non-appearing defendants and defendant Cash, who was found not liable for back pay under Title VII. As plaintiffs point out, however, hardly any time was spent on non-appearing defendants and work done involving Cash was relevant for claims against other defendants. This time will be allowed.

8. Legal research

Defendants argue that legal research should be billed at 50% of the full hourly rate allowed, citing Jennette v. City of New York, 800 F. Supp. 1165, 1170 (S.D.N.Y. 1992) (Knapp, J.). Courts have allowed reduced rates of compensation for legal research, particularly where, as in Jennette, the research was on a basic level. Such reductions are discretionary, however. As the Second Circuit has stated, "[i]n assessing the extent of . . . background research appropriate for a given case, a district court must be accorded ample discretion." New York State Ass'n for Retarded Children v. Carey, 711 F.2d at 1146. The court finds that much of the research performed by plaintiffs' attorneys was important to their presentation and preparation of the case. This action was lengthy, complicated, and hotly contested. However, the court does not believe that the several hundred hours expended were absolutely necessary. Thus, the research time will be compensated, but at a rate of 50%.

9. Time spent on state law claims

Defendants argue that plaintiffs should not recover any fees attributable to work on their state law claims, since New York State Human Rights Law does not allow for attorneys' fees. See New York Gaslight Club, Inc. v. Carey, 447 U.S. 54, 67 n.7 (1980); New York City Bd. of Educ. v. Sears, 443 N.Y.S.2d 23, 25 (App. Div. 1981). They contest time expended on psychological experts and examinations, arguing that the United States Supreme Court's holding in Harris v. Forklift Systems, Inc., --U.S.--, 114 S. Ct. 367 (1993), eliminated the need for plaintiffs to prove actual

psychological injury in order to succeed under Title VII. Thus, according to defendants, any time spent by plaintiffs' counsel on matters concerning psychological examinations would be relevant only to claims under the New York Human Rights Law, and would therefore not be billable to defendants.

The court rejects this limited reading of Supreme Court case law. While Harris did not hold that proof of psychological harm was not a necessary element of a hostile environment Title VII claim, the Court in no way dismissed such proof as irrelevant. Indeed, the Court noted that "[t]he effect [of workplace harassment] on the employee's psychological well-being is, of course, relevant to determining whether the plaintiff actually found the environment abusive." Harris, 114 S. Ct. at 371. Thus, the time plaintiffs' attorneys' spent on establishing psychological harm by consulting experts, defending their depositions, and the like, is relevant to the Title VII claims as well as to the state claims. This time will be allowed.

10. Time spent on unsuccessful claims

Ordinarily, fees may not be recovered for distinct, unsuccessful claims. Hensley, 461 U.S. at 440. However, in many cases

> the plaintiff's claims for relief will involve a common core of facts or will be based on related legal theories. Much of counsel's time will be devoted generally to the litigation as a whole, making it difficult to divide the hours expended on a claim-by-claim basis.

Hensley, 461 U.S. at 435. Thus, where time expended on successful claims is so intermingled with time spent on unsuccessful ones that a court cannot separate the two, no fee reduction is necessary. Terminate Control Corp. v. Horowitz, 28 F.3d 1335, 1343 (2d Cir. 1994) (agreeing with the Fifth Circuit that "'[w]here time spent on unsuccessful issues is difficult to segregate, no reduction of fees is required.'") (citation omitted). In the present case, plaintiffs' unsuccessful claims of quid pro quo sexual harassment were intermingled with their successful ones to

such an extent that the time expended is inseparable. The court will not give a reduction in hours for plaintiffs' unsuccessful claims.

Defendants make a specific challenge to the time spent on arguments concerning the retroactivity of the Civil Rights Act of 1991. Plaintiffs initially prevailed on this issue before the court. See Bridges, 800 F. Supp. 1172. After the court's ruling that the 1991 Act applied retroactively, however, the Second Circuit, in Butts v. City of New York Dep't of Housing Preservation & Devel., 990 F.2d 1397 (2d Cir. 1993), ruled otherwise. Following the Second Circuit's decision, the court ordered rebriefing on the retroactivity issue and subsequently overturned its previous decision. See Bridges, 850 F. Supp. at 218-19. Under these special circumstances, and particularly since rebriefing on retroactivity was by court order, the court will exercise its discretion to allow plaintiffs to bill for the time spent on this matter.

11. Additional hours

Finally, in response to the documentation submitted by plaintiffs' attorneys, the court adds the following hours to the lodestar amount for time spent defending the fee application: 28 hours for Lawrence Solotoff and 23 hours for Cheryl Solotoff. (See Pls.' Reply Aff. in Supp. of their Application for Allowance of Att'ys' Fees and Expenses and Supplemental Application.) These hours, when added to the original request of hours spent on the fee application itself, total a reasonable sum. As the Second Circuit has stated, "[t]he fee application is a necessary part of the award of attorney's fees. If the original award is warranted, we think that a reasonable amount should be granted for time spent in applying for the award." Donovan v. CSEA Local Union 1000, Amer. Fed'n of State, County & Municipal Employees, AFL-CIO, 784 F.2d 98, 106 (2d Cir.), cert. denied sub nom CSEA Local Union 1000, Amer. Fed'n of State, County & Municipal Employees, AFL-CIO v. Brock, 479 U.S. 817 (1986).

B. Hourly rate

Having determined the total number of hours plaintiffs are entitled to bill, the court turns to a consideration of the rates at

which these hours may be billed. A reasonable rate is one which is "in line with those prevailing in the community for similar services by lawyers of reasonably comparable skill, experience and reputation." Blum v. Stenson, 465 U.S. 886, 895 n.11 (1984). Plaintiffs have the burden of demonstrating the reasonableness of their hourly rate. This court has indicated that

> [i]deally, evidence of the prevailing market rate should include: "affidavits from attorneys with similar qualifications stating the precise fees they have received for comparable work or stating the affiant's personal knowledge of specific rates charged by other lawyers for similar litigation, data about fees awarded in analogous cases, [and] evidence of the fee applicant's rates during the relevant time period. . ."

Suarez v. Ward, No. 88 Civ. 7169, 1993 WL 158462 at *2 (May 13, 1993, S.D.N.Y.) (Carter, J.) (citation omitted).

Plaintiffs request rates for Lawrence Solotoff and Henry Kramer of $300 per hour trial time, $275 per hour pre- and post-trial, and $225 per hour travel time. For Cheryl Solotoff, requested rates are $250 per hour trial time, $225 per hour pre- and post-trial, and $175 per hour travel time. Plaintiffs also request $60 per hour for paralegal work. They submit documentation showing prevailing rates in 1992 and 1993 for New York City law firms to be from $100 to $500 per hour for partners, from $70 to $300 per hour for associates, and from $40 to $130 per hour for paralegals. They also submit a statement of their own fee scale as well as an affidavit and a declaration prepared for another case, attesting to similarly high rates.

In calculating attorneys' fees for cases that stretch over many years, it has been the practice in this Circuit to divide the litigation into two phases and use a historic rate for the early phase and a current rate for the later phase. Carey, 711 F.2d at 1153; Grant v. Martinez, 973 F.2d 96, 100 (2d Cir. 1992), cert. denied sub nom Bethlehem Steel Corp. v. Grant, --U.S.--, 113 S. Ct. 978 (1993). Plaintiffs' attorneys give the following rates as their customary charges in June, 1990, when they were first retained: $200 per hour for Lawrence Solotoff (and, presumably, for Henry Kramer), $175

per hour for Cheryl Solotoff, and $40 per hour for para-professional services. The court finds plaintiffs' 1990 rates reasonable in light of the prevailing rates at that time. Thus, for 1990-92, the court will apply rates of $200 per hour for all time billed by Lawrence Solotoff and Henry Kramer and $40 per hour for paraprofessional services. (Cheryl Solotoff did not begin billing hours on this case until 1994.) From 1993 onwards, hours submitted by Lawrence Solotoff and Henry Kramer will be compensated at a slightly higher rate, although not as high as the rates requested: $250 for Lawrence Solotoff and Henry Kramer, $200 for Cheryl Solotoff, and $60 for paralegals.

The court finds these rates reasonable in light of the experience levels of each attorney and the prevailing rates for comparable legal services. Plaintiffs' documentation provides support. Lawrence Solotoff shows impressive experience as a civil rights attorney. He has been practicing in New York for more than 20 years. He has litigated extensively and has taken an active role in the development of employment discrimination doctrine. Henry Kramer is an accomplished labor lawyer, with nearly 30 years of experience as an attorney. Ms. Solotoff, a 1987 law school graduate, has less experience but has represented a variety of clients in litigation in her more than seven years of practice.

Case law also supports an award of fees at the rates requested. See, e.g., Loper v. New York City Police Dept., 853 F. Supp. 716, 720 (S.D.N.Y. 1994) (Sweet, J.) ($250 per hour is appropriate for a civil rights litigator with seven years experience in the field); Monaghan v. SZS 33 Assocs., LP, 154 F.R.D. 78, 85 (S.D.N.Y. 1994) (Sweet, J.) ($250 to $300 per hour is appropriate for experienced partners from 1990-93; $120 to $180 per hour is appropriate for associates in the same years); Jennette v. City of New York, 800 F. Supp. at 1169 (compensation of $200 per hour is reasonable for an experienced civil rights lawyer who is a solo practitioner); Williams v. City of New York, 728 F. Supp. 1067, 1071 (S.D.N.Y. 1990) (Patterson, J.) ($200 per hour is reasonable for a senior trial attorney in small to medium-size firm for work performed in 1984-85 and 1988-89); Carrero v. New York City Housing Authority, 685 F. Supp. at 908 ($175 per hour is

reasonable for a 1978 Harvard graduate with "extensive and impressive" experience prosecuting civil rights claims; $150 per hour is reasonable for a less experienced attorney).

C. Adjustments

Upward or downward adjustments from the lodestar calculations are not favored; there is a "'strong presumption' that the lodestar figure represents the 'reasonable' fee." City of Burlington v. Dague, 505 U.S. 557, 562 (1992) (citation omitted). Furthermore, "[t]he party advocating such a departure . . . bears the burden of establishing that an adjustment is necessary to the calculation of a reasonable fee." Grant v. Martinez, 973 F.2d at 101 (citation omitted). A fee award may not be reduced because of the ratio of the actual recovery to the requested damages, or the actual recovery to the fee request. See, e.g., Cowan v. Prudential Ins. Co. of America, 935 F.2d 522, 526 (2d Cir. 1991) ("[a] presumptively correct 'lodestar' figure should not be reduced simply because a plaintiff recovered a low damage award").

Defendants argue that the fee award should be adjusted downward due to plaintiffs' limited success in pursuing their sexual harassment claims. In Hensley v. Eckerhart, the United States Supreme Court set forth a two-step process for determining when a plaintiff's limited success justifies an across-the-board reduction in the lodestar amount:

> [f]irst, did the plaintiff fail to prevail on claims that were unrelated to the claims on which he succeeded? Second, did the plaintiff achieve a level of success that makes the hours reasonably expended a satisfactory basis for making a fee award?

Hensley, 461 U.S. at 434.

In the present case, plaintiffs' successful and their unsuccessful claims involve a common core of facts; the claims are intertwined. Thus, no time should be subtracted under the first prong. Nor does the second prong of the Hensley test justify a reduction, since plaintiffs in fact accomplished most of their goals in this action. Plaintiffs were found under state and federal law to

have suffered from sexual harassment; they won more than $100,000 in a vindication of their rights. The lodestar amount is reasonable in relation to the results obtained by plaintiffs.

The court is aware that this fee award is a large one. It is justified, however, by the length of this litigation, the acrimony and vigor with which every point was contested, and the importance that such cases be brought as remedies for violations of civil rights. In Grant v. Martinez, the Second Circuit noted that the monetary settlement reached in that case did "not fully reflect the benefit the public gleaned from the litigation leading up to the settlement"; in helping to establish precedent that contributed to the change in discriminatory hiring practices, plaintiffs "vindicated a policy that Congress considered of the highest importance . . . a public benefit for which [plaintiffs] and their counsel may be compensated." Grant, 973 F.2d at 102. Similarly, this case contributed to Title VII case law and helped to realize Congress's intent in passing the Civil Rights Act of 1964. Plaintiffs, and others like them who suffer from sexual harassment, must have appropriate remedies available to them or the rights become meaningless. Attorneys' fees are one way to ensure that such avenues remain open. See Newman v. Piggie Park Enterprises, Inc., 390 U.S. 400, 402 (1968) (affirming that Congress enacted legislation authorizing fee awards in civil rights cases in order to enable those whose rights have been violated to seek redress in the courts).

The following figures represent the lodestar amount:

Lawrence Solotoff

1990-92:

399.50	hours	requested
– 22.50	hours	50% reduction in research time
– 6.75	hours	50% reduction in travel time
– 2.50	hours	requests for extensions
– 11.50	hours	administrative tasks
– 35.63	hours	10% reduction
320.63	hours	allowed

320.63 hours x $200/hr = $64,126.00

1993-95:

1866.25	hours	requested
– 100.00	hours	travel time
– 75.00	hours	deposition preparation
– 100.00	hours	post-trial work
– 2.50	hours	administrative tasks
– 76.00	hours	50% reduction in research time
– 24.13	hours	50% reduction in remainder of travel time
– 8.25	hours	requests for extensions
+ 28.00	hours	work on fee application
– 150.84	hours	10% reduction
1357.53	hours	allowed

1357.53 hours x $250/hr = $339,382.50

Henry Kramer

1990-92:

112.25	hours	requested
– 10.75	hours	50% reduction in research time
– 10.00	hours	administrative tasks
– 9.15	hours	10% reduction
82.35	hours	allowed

82.35 hours x $200/hr = $16,470.00

1993-95:

1212.25	hours	requested
– 100.00	hours	travel time
– 58.25	hours	50% reduction in remainder of travel time
– 57.75	hours	50% reduction in research time
– 75.00	hours	deposition preparation
– 92.13	hours	10% reduction
829.12	hours	allowed

753.12 hours x $250/hr = $188,280.00

76 hours x $200/hr = $15,200 (attendance at depositions billed at lower scale)

Cheryl Solotoff

510.00	hours	requested
– 50.00	hours	post-trial work
+ 23.00	hours	work on fee application
– 12.50	hours	50% reduction in travel time
– 47.05	hours	20% reduction
376.40	hours	allowed

376.40 hours x $200/hr = $75,280

paraprofessionals

1990-92:

12.00	hours	requested
– 6.00	hours	50% reduction in research
– .60	hours	10% reduction
5.40	hours	allowed

5.4 hours x $40/hr = $216

1993-95:

501.50	hours	requested
– 11.75	hours	50% reduction in research
– 48.98	hours	10% reduction
440.77	hours	allowed

440.77 hours x $60/hr = $26,446.20

TOTAL FEE AWARD: $725,400.70

V. Other costs and expenses

Plaintiffs seek costs incurred in the course of litigation both by their attorneys and by themselves. They request $23,098.26 for Solotoff & Solotoff, $32,474.47 for plaintiffs themselves, $3,536.57 for Henry Kramer, and $9,275.00 for Dr. Paludi's expert witness fees and expenses (in addition to a $1500 retainer, included in counsel's expenses). Defendants argue that the motion for costs should be denied due to inadequate documentation, or at least reduced across the board for inaccuracies.

Traditionally, costs of litigation recoverable by the prevailing party have been limited to those authorized by Rule 54(d), Fed. R.

Civ. P., and enumerated in 28 U.S.C. § 1920.[7] See Crawford Fitting Co. v. J.T. Gibbons, Inc., 482 U.S. 437, 441 (1987) (28 U.S.C. § 1920 "defines the term 'costs' as used in Rule 54(d)"). However "[w]here attorneys' fees are expressly authorized by statute . . . Rule 54(d) is no longer relevant." Wheeler v. Durham City Board of Educ., 585 F.2d 618, 623 (4th Cir. 1978). Thus, civil rights statutes which expressly authorize attorneys' fees have been interpreted to allow compensation for reasonable costs of litigation over and above those enumerated in 28 U.S.C. § 1920, such as attorneys' travel expenses. See, e.g., Soc'y for Good Will to Retarded Children v. Cuomo, 574 F. Supp. at 1002. Of particular relevance to the present case,

> Title VII's provision on costs has been construed as a supplemental power conferred upon courts "to award those reasonable out-of-pocket expenses incurred by the attorney which are normally charged to a fee-paying client in the course of providing legal services."

Noble v. Herrington, 732. F. Supp. 114, 118 (D.D.C. 1989) (citations omitted).

It is clear, then, that reasonable attorneys' expenses may be recovered by the prevailing party in civil rights cases as a part of the attorneys' fees. The same does not necessarily hold true for expenses incurred by plaintiffs themselves, however, other than those enumerated in 28 U.S.C. § 1920. The court finds no

---

[7] 28 U.S.C. § 1920 states that
A judge or clerk of any court of the United States may tax as costs the following:
(1) Fees of the clerk and marshal;
(2) Fees of the court reporter for all or any part of the stenographic transcript necessarily obtained for use in the case;
(3) Fees and disbursements for printing and witnesses;
(4) Fees for exemplification and copies of papers necessarily obtained for use in the case;
(5) Docket fees under section 1923 of this title;
(6) Compensation of court appointed experts, compensation of interpreters, and salaries, fees, expenses, and costs of special interpretation services under section 1828 of this title.

authority to grant compensation for plaintiffs' travel expenses, hotel bills, and the like; neither 28 U.S.C. § 1920 nor 42 U.S.C. § 2000e-5(k) allows for such costs. Furthermore, even if these categories of costs are allowed, plaintiffs must show that they were necessary to the advancement of the litigation. They have not done so. Plaintiffs' requests for costs incurred by themselves will be disallowed, except for those falling within the provisions of 28 U.S.C § 1920.

The only area of plaintiffs' request for reimbursement for their own costs that arguably falls within the bounds of § 1920 is their request for expert fees. However, expert fees are not recoverable in attorney fee and expense awards under 42 U.S.C. § 1988. West Virginia Univ. Hosps., Inc. v. Casey, 499 U.S. 83, 102 (1991).[8] See also Myree v. Local 41, Int'l B'hood for Elec. Workers, 847 F. Supp. 1059, 1066 (S.D.N.Y.) (Sknetny, J.), aff'd, 29 F.3d 620 (2d Cir. 1994). Because the statute granting attorneys' fees and expenses under Title VII, 42 U.S.C. § 2000e-5(k), is substantively identical to 42 U.S.C. § 1988, the court is bound by West Virginia Univ. Hosps., Inc., and defendants are not required to pay for plaintiffs' expert testimony.

Dr. Paludi alone testified as an expert witness for plaintiffs at trial. Thus her time spent testifying is not recoverable, apart from $40 per day allowed by statute. See 28 U.S.C. 1821(b) and 1920; West Virginia Univ. Hosps., Inc., 499 U.S. at 86; Cruz v. Local Union No. 3, Int'l B'hood of Elec. Workers, 150 F.R.D. 29, 37 (E.D.N.Y. 1993), aff'd on this issue, rev'd in part on other grounds, 34 F.3d 1148 (2d Cir. 1994). However, plaintiffs may recover costs from defendants for the time Dr. Paludi spent responding to discovery, including her time being deposed by defendants. See Rule 26(b) (4) (C), F.R. Civ. P. Thus the court will allow $50 for Dr. Paludi's preparation for her deposition, $2,175 for her deposition, and $460 for costs connected to the deposition,

---

8 This holding was subsequently overturned by the Civil Rights Act of 1991, and 42 U.S.C. § 2000e-5(k) was amended to allow explicitly for the recovery of expert fees. See Pub. Law 102-166, § 113(b) (Nov. 21, 1991). The Act does not apply to this case, however, Prisco, 850 F. Supp. 216, and therefore West Virginia Univ. Hosps., Inc. controls.

for a total of $2,685.

Dr. Czekala, Dr. Smolar, and Mr. Becallo were not offered as experts and did not testify as such: they were fact witnesses who discussed their past treatment of plaintiffs and did not render expert opinions. They are not covered by Rule 26(b) (4) (C), and plaintiffs may not recover costs connected with discovery for these witnesses. Plaintiffs may recover $40 per day of trial testimony for each of these witnesses, pursuant to 28 U.S.C. §§ 1821(b) and 1920.

Before moving on to a consideration of plaintiffs' attorneys' costs, the court must comment on one aspect of the disallowed cost application. Plaintiff Bridges's expenses are nothing short of outrageous. This section alone of the fee application perhaps justifies defendants' hyperbole. A partial list serves to illustrate the exorbitant nature of her claims. Bridges bills defendants for a "Travel Certificate for Pet" for two round-trip flights from San Diego to New York in 1993 and 1994, totalling $204. Her own airfare for these flights cost more than $1,000 each way. Her hotel charges often exceed $250 per night. She charges defendants for a string of movies viewed in her hotel room during the trial, as well as frequent trips to hotel fitness center. She made a string of unidentified telephone and fax charges, totalling more than $1,000, for which defendants are expected to pay. Her meal charges are extraordinary: dinner for $150 on January 12, 1995; dinner for $95 on January 25, 1995; dinner for $99.33 on January 26, 1995; drinks for $20 and dinner for $175.42 on January 27, 1995; a room service breakfast for $51.55 on January 28, 1995; dinner for $127 on January 30, 1995; dinner for $149.82 on February 2, 1995; and a room service breakfast for $51.55 on February 5, 1995, to name only a few. Even if these costs were not disallowed for other reasons, the court would not hesitate to reject them as unreasonable, ridiculous, and profligate.

In general, the documentation of plaintiffs' attorneys' costs is adequate to support their claims that the costs were incurred in legitimate and necessary pursuit of their prevailing claims. However, there are several areas in which charges are neither

adequately explained nor properly documented. Kramer includes various charges for unidentified phone calls, failing to state whether these calls were made in connection with this lawsuit, to whom they were made, and what matters were discussed. In the absence of such explanations, the court cannot ascertain whether the phone calls are appropriate expenses; thus, they will not be allowed. In addition, plaintiffs bill for certain costs more properly attributable to overhead expenses of their attorneys' law offices than to this specific lawsuit, such as various entries identified only as "supplies". These expenses will not be allowed. Reid v. New York, 584 F. Supp. 461, 462 (S.D.N.Y. 1984) (Duffy, J.).

Finally, the court adds $282.07 in expenses incurred by plaintiffs in defending the fee application. (See, Pls.' Reply Affidavit in Support of their Application for Allowance of Att'ys' Fees and Expenses and Supplemental Application.)

Expenses

Solotoff & Solotoff	
$23,098.26	amount requested
– 409.92	supplies
– 1500.00	retainer to Dr. Paludi
+ 80.00	expert fees allowed (two days of testimony)
+ 2,685.00	expert fees for discovery matters
+ 282.07	expenses incurred in fee application
$24,235.41	TOTAL GRANTED
Henry Kramer	
$3,536.57	amount requested
– 81.34	unspecified telephone charges
– 48.35	supplies
$3,406.88	TOTAL GRANTED
Susan Bridges	
$80.00	witness fees allowed (two days of testimony)
Virginia D'Aponte	
$40.00	witness fees allowed (one day of testimony)

Kimberly Muryasz
$40.00 witness fees allowed (one day of testimony)

TOTAL EXPENSES: $27,802.29

VI. Prejudgment interest

Finally, plaintiffs claim that they are entitled to prejudgment interest on the back pay awarded plaintiffs D'Aponte and Muryasz from their respective dates of discharge (February 5, 1990, for Muryasz and March 28, 1990, for D'Aponte) to the date of the judgment. District courts may award prejudgment interest on Title VII back pay awards. Clarke v. Frank, 960 F.2d 1146, 1153 (2d Cir. 1992). Indeed, "it is ordinarily an abuse of discretion not to include pre-judgment interest in a back-pay award. . ." Donovan v. Sovereign Security, Ltd., 726 F.2d 55, 58 (2d Cir. 1984) (emphasis added). Muryasz and D'Aponte are therefore entitled to prejudgment interest for their back pay awards.

The appropriate rate of interest to apply is also within the court's discretion. McIntosh v. Irving Trust Co., 873 F. Supp. 872, 882 (S.D.N.Y. 1995) (Koeltl, J.). The court will apply the United States treasury bill rate as provided by 28 U.S.C. § 1961(a), a rate which plaintiffs and defendants alike apparently espouse. See McIntosh, 873 F. Supp. at 882 (applying rate from 28 U.S.C. § 1961); Cefali v. Buffalo Brass Co., Inc., 748 F. Supp. 1011, 1025 (W.D.N.Y. 1990) (same). Plaintiffs are to submit to the court a calculation of interest to be awarded on their back pay, from their respective dates of discharge to the date judgment was entered, using the average United States treasury bill rate over this period of time. See McIntosh, 873 F. Supp. at 883 ("[u]sing the average rate provides the plaintiff with an amount that he could have obtained on a relatively safe investment while taking into account the effects of inflation and the fluctuation in the rate over the long period of time involved"). The interest should be compounded. Salpaugh v. Monroe Community Hospital, 4 F.3d 134, 145 (2d Cir. 1993), cert. denied, --U.S.--, 114 S. Ct. 1189 (1994) ("[g]iven that the purpose of back pay is to make the plaintiff whole, it can only be achieved if interest is compounded"). The court declines to spread the back

pay award over time; these back pay awards are relatively small amounts of money, meant to compensate for relatively short periods of time. There is no need to engage in convoluted calculations in order to adjust them to account for the spread over time.

Conclusion

The court's opinion of September 7, 1995, is hereby clarified: all three plaintiffs have prevailed on their Title VII claims against defendant Yourdan. Plaintiffs D'Aponte and Muryasz are thus entitled to back pay under both Title VII and New York law, although they may not recover double back pay. The back pay awards should be increased by prejudgment interest dating from their respective dates of discharge to the date of the judgment. Plaintiff Bridges prevails under Title VII for the purposes of attorneys' fees, although she makes no financial recovery under the statute.

For the reasons set forth above, plaintiffs' motion for attorneys' fees and expenses is granted to the extent of $725,400.70 in fees and $27,802.29 in expenses, for a total award of $753,202.99.

IT IS SO ORDERED.

Dated: New York, New York
February 6, 1996

s/ Robert L. Carter
ROBERT L. CARTER
U.S.D.J.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
UNITED STATES COURT HOUSE
40 FOLEY SQUARE
NEW YORK 10007

MANDATE

SDny-Foley
Judge Carter
91-CV-7985

GEORGE LANGE III
CLERK

At a Stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 10th day of December, one thousand nine hundred and ninety-six.

PRESENT: HON. James L. Oakes
HON. Joseph M. McLaughlin
HON. José A. Cabranes
Circuit Judges

Docket Nos: 96-7220, 96-7250

Stamp: UNITED STATES COURT OF APPEALS
FILED DEC 10 1996

SUSAN Q. BRIDGES; VIRGINIA D'APONTE; and KIMBERLY MURYASZ,

Plaintiffs-Appellees-Cross-Appellants,

v

EASTMAN KODAK COMPANY; THOMAS A. WALKER; JOHN KUCIK; MICHAEL FRENCH; KEVIN CASH; MARY HEAPHY; DAVID OFFENHARTZ, as Supervisors, Agents and Employees of Eastman Kodak Company,

Defendants,

YOURDON, INC.,

Defendant-Appellant-Cross-Appellee.

Appeals from United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the Southern District of New York and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby **ORDERED, ADJUDGED, and DECREED** that the judgment of said district court be and it hereby is affirmed in accordance with the opinion of this court.

For the Court
GEORGE LANGE III, Clerk
By: s/ Beth J. Meador
Beth J. Meador
Administrative Attorney

ISSUED AS MANDATE.
1-2-97

Stamp:

---
s/ George Krug----

Stamp: U.S. DISTRICT COURT
FILED
FEB. 14 1996
S.D. OF N.Y.
99
FEB 15 1996 900 AM

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

_____X

SUSAN Q. BRIDGES, VIRGINIA D'APONTE, and KIMBERLY MURYASZ,

Plaintiffs,

-against-

EASTMAN KODAK COMPANY, YOURDON, INC., THOMAS A. WALKER, JOHN KUCIK, MICHAEL FRENCH, KEVIN CASH, MARY HEAPHY, and DAVID OFFENHARTZ as Supervisors, Agents, and Employees of Eastman Kodak Company and Yourdon, Inc. (A Kodak Company),

Defendants.

_____X

91 CIVIL 7985 (RLC)

JUDGMENT

#96,0297

Plaintiffs having moved pursuant to Rules 52(b) and 59(e) of the Federal Rules of Civil Procedure, for the Court to "Review; Amend; Modify or Clarify" its Opinion of September 7, 1995; and the said motion having come before the Honorable Robert L. Carter, United States District Judge; and the Court thereafter on February 6, 1996, having rendered its Corrected Opinion (76036), clarifying the Court's Opinion of September 7, 1995, it is,

ORDERED, ADJUDGED AND DECREED: That the Opinion of September 7, 1995 is hereby clarified; all three Plaintiffs have prevailed on their Title VII claims against Defendant Yourdan; and it is further,

ORDERED, that Plaintiffs D'Aponte and Muryasz are entitled to back pay under both Title VII and New York law,

although they may not recover double back pay. The back pay awards should be increased by prejudgment interest dating from their respective dates of discharge to the date of the judgment; and it is further,

ORDERED, that Plaintiff Bridges prevails under Title VII for the purposes of attorneys' fees, although she makes no financial recovery under the statute; and it is further,

ORDERED, that for the reasons set forth in the Corrected Opinion (76036) of February 6, 1996, Plaintiffs' motion for attorneys' fees and expenses is granted to the extent of $725,400.70 in fees and $27,802.29 in expenses, for a total award of $753,202.99; accordingly, it is further,

ORDERED, that Plaintiffs have judgment for the sum of $753,202.99 in attorneys' fees and expenses.

DATED: New York, New York
February 14, 1996

JAMES M. PARKISON

Clerk of Court
BY: s/John S. Hagen
Deputy Clerk

Stamp:

ON THE --------2-15-96

Supreme Court, U.S.
FILED
MAY 12 1997
OFFICE OF THE CLERK

No. 96-1432

In The

Supreme Court of the United States

October Term, 1996

YOURDON, INC.,

Petitioner,

vs.

SUSAN Q. BRIDGES, VIRGINIA D'APONTE and KIMBERLY MURYASZ,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

RESPONDENTS' BRIEF IN OPPOSITION TO WRIT OF CERTIORARI

LAWRENCE SOLOTOFF
Counsel of Record
SOLOTOFF & SOLOTOFF
P.O. Box 4686
Great Neck, New York 11023
(516) 466-5522
Counsel for Respondents

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF CITED AUTHORITIES ii

STATUTORY PROVISIONS INVOLVED 1

STATEMENT OF THE CASE 2

I. THE SECOND CIRCUIT PROPERLY FOUND RESPONDENT BRIDGES A "PREVAILING PARTY" ENTITLED TO ATTORNEYS' FEES AND EXPENSES FULLY CONSISTENT WITH THIS COURT'S HOLDING IN *FARRAR V. HOBBY*, 506 U.S. 103 (1992) AND PRIOR RULINGS 5

A. Bridges Is Entitled To Attorneys' Fees And Expenses For Her Pendent Claims 6

B. Bridges Was A Prevailing Party For Purposes Of Obtaining An Award Of Attorneys' Fees And Expenses 12

II. THE SECOND CIRCUIT PROPERLY AFFIRMED THE DISTRICT COURT'S ATTORNEYS' FEE AWARD CONSISTENT WITH THIS COURT'S HOLDING IN *FARRAR V. HOBBY*, 506 U.S. 103 (1992) AND PRIOR RULINGS 19

A. The Second Circuit Considered Respondents' Overall Success On The Merits Of Title VII And Pendent State Law Claims 19

B. In Affirming The District Court's Fee Award, The Second Circuit Followed *Farrar v. Hobby* And Prior Rulings Of This Court 22

TABLE OF CONTENTS – Continued

Page

III. THIS COURT SHOULD HAVE NO INTEREST IN GRANTING A WRIT OF CERTIORARI IN THIS CASE 25

CONCLUSION 27

TABLE OF AUTHORITIES

Page

CASES

Albright v. Good Shepherd Hosp., 901 F.2d 438 (5th Cir. 1990) 16

Aubin v. Fudala, 782 F.2d 287 (1st Cir. 1986) 14

Bray v. Alexandria Women's Health Clinic, 506 U.S. 263 (1993) 16

Bridges v. Yourdon, Inc., 102 F.3d 56 (2nd Cir. 1996) 4

Bridges v. Eastman Kodak Co., 91 Civ. 7985, 1996 WL 47304, F.E.P. Cases (S.D.N.Y. Feb. 6, 1996) (Carter, J.) 2, 3, 23, 24

Bridges v. Eastman Kodak Co., 885 F.Supp. 495, 66 F.E.P. Cases 1688 (S.D.N.Y. Jan. 19, 1995) (Carter, J.) 2

Bridges v. Eastman Kodak Co., 850 F.Supp. 216, 64 F.E.P. Cases 1100 (S.D.N.Y. 1994) (Carter, J.) 2

Bridges v. Eastman Kodak Co., 822 F.Supp. 1020, 64 F.E.P. Cases 1093 (S.D.N.Y. 1993) (Carter, J.) 2

Bridges v. Eastman Kodak Co., 800 F. Supp. 1172, 61 F.E.P. Cases 9 (S.D.N.Y. 1992) (Carter, J.) 2

Bridges v. Eastman Kodak Co., 1995 WL 529880, 68 F.E.P. Cases 1587 (S.D.N.Y. Sept. 8, 1995) (Carter, J.) 2

Carey v. Piphus, 435 U.S. 247 (1978) 20

Carrol v. Blinken, 105 F.3d 79 (2d Cir. 1997) 22

Cartwright v. Stamper, 7 F.3d 106 (7th Cir. 1993) 17

City of Riverside v. Rivera, 477 U.S. 561 (1986) 20, 21

Cramblit v. Fiske, 33 F.3d 633 (6th Cir. 1994) 17

TABLE OF AUTHORITIES – Continued

Page

Farrar v. Hobby, 506 U.S. 103 (1992) ..... *passim*

Gingras v. Lloyd, 740 F.2d 210 (2d Cir. 1984) 13

Hanrahan v. Hampton, 446 U.S. 754 (1980) 17

Hensley v. Eckerhart, 461 U.S. 424 (1983) ..... *passim*

Hewitt v. Helms, 482 U.S. 755 (1987) 10, 11, 13, 19

Jackson v. Galan, 868 F.2d 165 (5th Cir. 1989) 17

Kelly v. City of Leesville, 897 F.2d 172 (5th Cir. 1990) 16

Kremer v. Chemical Construction Corp., 456 U.S. 461 (1982) 8, 9

Mateyko v. Felix, 924 F.2d 824 (9th Cir. 1990), *cert. denied*, 502 U.S. 814 (1991) 16

McLaughlin v. State, 784 F.Supp. 961 (N.D.N.Y. 1992) 16

Meritor Savings Bank v. Vinson, 477 U.S. 57 (1986) 24

Milton v. Des Moines, 47 F.3d 944 (8th Cir. 1995), *cert. denied*, ___ U.S. ___, 116 S.Ct. 87 (1995) 17

National Org. For Women v. Operation Rescue, 37 F.3d 646 (D.C. Cir. 1994) 6, 15

National Private Truck Council, Inc. v. Oklahoma Tax Comm'n, ___ U.S. ___, 115 S.Ct. 2351 (1995) 16

Newman v. Piggie Enterprises, 390 U.S. 400 (1968) 11, 24

New York Gaslight Club, Inc. v. Carey, 447 U.S. 54 (1980) 6, 12, 18

TABLE OF AUTHORITIES – Continued

Page

North Carolina Department of Transportation v. Crest Street Community Council, Inc., 479 U.S. 6 (1986) 7, 11, 18

Orchano v. Advanced Recovery, Inc., 107 F.3d 94 (2d Cir. 1997) 22

Pedigo v. P.A.M. Transport, Inc., 98 F.3d 396 (8th Cir. 1996) 17

Pierce v. Underwood, 487 U.S. 552 (1988) 20

Pino v. Locascio, 101 F.3d 235 (2nd Cir. 1996) 22

Rhodes v. Stewart, 488 U.S. 1 (1988) 16

Romberg v. Nichole, 48 F.3d 453 (9th Cir. 1995), *cert. denied*, ___ U.S. ___, 116 S.Ct. 379 (1995) 18

Ruggiero v. Krzeminski, 928 F.2d 558 (2d Cir. 1991) 14

Slade v. United States Postal Service, 952 F.2d 357 (10th Cir. 1991) 16

Song v. Ives Laboratories, Inc., 957 F.2d 1041 (2d Cir. 1992) 8, 9

Terminate Control Corp. v. Horowitz, 28 F.3d 1335 (2d Cir. 1994) 20

Texas State Teachers Ass'n v. Garland Indep. School District, 489 U.S. 782 (1989) 9, 10, 13, 14

U.S. Football League v. National Football League, 887 F.2d 408 (2d Cir. 1989), *cert. denied*, 493 U.S. 1071 (1990) 21

Walker v. Anderson Electrical Connectors, 944 F.2d 841 (11th Cir. 1991), *cert. denied*, 506 U.S. 1078 (1993) 16

Webb v. Dyer County Board of Education, 471 U.S. 234 (1985) 7

Williams v. Thomas, 692 F.2d 1032 (5th Cir. 1982) 14

TABLE OF AUTHORITIES – Continued

Page

STATUTES AND OTHER AUTHORITIES

Civil Rights Attorneys Fees Awards Act of 1976, 42 U.S.C. § 1988 (1988 & Supp. IV) ..... *passim*

Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e-5(k) ..... *passim*

New York State Human Rights Law, 18 McKinney's N.Y. Executive Law, § 296(1)(a) (1982)... *passim*

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondents Susan Q. Bridges, Virginia D'Aponte, and Kimberly Muryasz respectfully request that this Court deny Petitioner Yourdon, Inc.'s application for a writ of certiorari.

RESPONDENTS' OBJECTIONS

The respondents object to the petitioner's statement of the facts and the issues of law.

STATUTORY PROVISIONS INVOLVED

The Civil Rights Act of 1964, Title VII, Section 706(k), 42 U.S.C. § 2000e-5(k), provides:

> "In any *action or proceeding under . . . [Title VII]* the Court, in its discretion, may allow the prevailing party, other than the [Equal Employment Opportunity] Commission or the United States, a reasonable attorneys' fee as part of the costs, and the Commission and the United States shall be liable for the costs the same as a private person." (Emphasis added)

The Civil Rights Attorneys' Fees Awards Act of 1976, 42 U.S.C. § 1988 provides:

> "In any *action or proceeding to enforce a provision of [42 U.S.C. Title VII]* sections 1981, 1982, 1983, 1985, and 1986 of this title, . . . *the court*, in its discretion, *may allow the prevailing party*, other

than the United States, *a reasonable attorneys' fee as part of the costs.*" (Emphasis added)

STATEMENT OF THE CASE

This case involved, among other things, the equitable damages provisions of the Civil Rights Act of 1964, as amended, [42 U.S.C. § 2000e-5(g), (k)] prior to the adoption of the Civil Rights Act of 1991 (42 U.S.C. § 1981A) (November 21, 1991) and New York State Law [NYS Executive Law, § 290 *et seq.*] which permits a jury award for compensatory damages for sex discrimination in the employment context and award of attorneys' fees [42 U.S.C. § 1988].

In November, 1991, following a one (1) year exhaustion of administrative remedies at the EEOC level [1990-1991], respondents filed suit under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e *et seq.*, and the New York Human Rights Law, N.Y. Exec. Law § 296(1)(a), alleging *quid pro quo* sexual harassment and the creation of a hostile work environment. For an extensive factual and procedural background, see *Bridges v. Eastman Kodak Co.*, 91 Civ. 7985, 1996 WL 47304 (S.D.N.Y. Feb. 6, 1996) (Carter, J.); *Bridges v. Eastman Kodak Co.*, 1995 WL 529880, 68 F.E.P. Cases 1587 (S.D.N.Y. Sept. 8, 1995) (Carter, J.); *Bridges v. Eastman Kodak Co.*, 885 F.Supp. 495, 66 F.E.P. Cases 1688 (S.D.N.Y. Jan. 19, 1995) (Carter, J.); *Bridges v. Eastman Kodak Co.*, 850 F.Supp. 216, 64 F.E.P. Cases 1100 (S.D.N.Y. 1994) (Carter, J.); *Bridges v. Eastman Kodak Co.*, 822 F.Supp. 1020, 64 F.E.P. Cases 1093 (S.D.N.Y. 1993) (Carter, J.); *Bridges v. Eastman Kodak Co.*,

800 F. Supp. 1172, 61 F.E.P. Cases 9 (S.D.N.Y. 1992) (Carter, J.) (Record A-22).[1]

In January and February, 1995 the respondents tried their case before a federal jury based on their complaint, which asserted, that in 1989 and 1990, while respondents were employed at Yourdon, Inc. (hereinafter "Yourdon") (an Eastman Kodak Company subsidiary), they suffered acts of serious sexual harassment involving penile exposure, urination in waste baskets, and extremely lewd and offensive comments. This created a sexually hostile working environment resulting in their constructive discharge in February and March of 1990. Each respondent corroborated the sex discrimination claims of the other.

This action was tried before a jury over the course of two weeks in January and February, 1995, with the jury rendering a "special verdict" in favor of the respondents for back pay and emotional injuries on their pendent N.Y. State Human Rights Law, Executive Law, § 296(1)(a) (1982) claims awarding a combined $124,110.65 in damages and interest in this matter.

In February, 1996 the district court awarded the respondents' attorneys' fees and costs following their successful Title VII (and related state law) action against Yourdon. See *Bridges v. Eastman Kodak Co.*, No. 91 Civ. 7985, 1996 WL 43704 (S.D.N.Y. Feb. 6, 1996) (CA-1-7).[2] Yourdon appealed to the Second Circuit challenging the

---

[1] The reference (Record "A-page") refers to the Record On Appeal to the Circuit Court of Appeals for the Second Circuit.

[2] The reference (Record "CA-page") refers to the Appendix annexed to the petition for writ of certiorari.

extent of the fee award as against the amount sought and specifically challenged Ms. Bridges' eligibility for attorneys' fees and costs.

On December 10, 1996 the Second Circuit reviewed the substantial jury award, the specific and overall outcome of the case [for all three plaintiffs], the district court's findings of liability as defined by Title VII and federal law, and fully affirmed the district court's award of attorneys' fees.

The circuit court, in *Bridges v. Yourdon, Inc.*, 102 F.3d 56 (2nd Cir. 1996) held that the district court did not abuse its discretion in awarding attorneys' fees in the amount that it did *based on the substantial outcome, the representation of all three plaintiffs, and the nature of the litigation and the defense presented.* The circuit court separately addressed the issue of Ms. Bridges' eligibility for attorneys' fees and costs. In doing so it specifically addressed this Court's holding in *Farrar v. Hobby*, 506 U.S. 103, 109 (1992) and other rulings. The circuit court held that Ms. Bridges was a "prevailing party" eligible for attorneys' fees and costs. Following the appeal, Yourdon filed the petition for writ of certiorari in March, 1997.

I

THE SECOND CIRCUIT PROPERLY FOUND RESPONDENT BRIDGES A "PREVAILING PARTY" ENTITLED TO ATTORNEYS' FEES AND EXPENSES FULLY CONSISTENT WITH THIS COURT'S HOLDING IN *FARRAR V. HOBBY*, 506 U.S. 103 (1992) AND PRIOR RULINGS

The unanimous opinion of the Second Circuit in this case, that Ms. Bridges was a "prevailing party," was based on the correct application of this Court's decision in *Farrar v. Hobby*, 506 U.S. 103 (1992). The circuit court properly refused to ignore respondent Bridges' success on the essential elements of her federal and state law claims, which, Yourdon argues this Court should do to grant the writ of certiorari.

Yourdon argued that this Court must, and should, refuse to credit all three respondents with having obtained a large financial recovery and substantial success on their state law claims; a sum totalling $124,110.65. Yourdon's premise is entirely unsupported by statute or precedented case law. Petitioner fails to cite reference to a single case in support of this premise.[3]

---

[3] Respondents signaled an interest to settle the case at every phase of the litigation. Kodak and Yourdon simply were not interested in pursuing a settlement, or, an FRCP Rule 68 Offer of Judgment. (A-130) *The award of attorneys' fees and expenses represented the services rendered by counsel on behalf of all the respondents whose claims were intertwined.* Attorneys' fees would remain the same under these circumstances regardless of the number of respondents. The respondents would have been witnesses to each others' case and would have been deposed and attended the trial in any event. Yourdon skewed the respondents' overall success on the merits by excluding any

The Second Circuit and the district court considered the *entire* recovery of $124,110.65 as "substantial" and not "technical." It held that the fee and expense award was justified given the specific facts and experiences of the parties of this case.

A. Bridges Is Entitled To Attorneys' Fees And Expenses For Her Pendent Claims

This Court's ruling in *New York Gaslight Club, Inc. v. Carey*, 447 U.S. 54, 57-58, 100 S.Ct. 2024, 64 L.Ed.2d 723 (1980), has settled, over a decade ago, the issue that a plaintiff who receives all of her relief under New York State Law, and whose federal claim has not been rejected, is entitled to an award of attorneys' fees in her original Title VII enforcement action.

An award of attorneys' fees may properly extend to related pendent state law claims, if the party also prevails on her federal civil rights claim. See *National Organization For Women v. Operation Rescue*, 37 F.3d 646, 653 (D.C. Cir. 1994), citing reference to *Hensley v. Eckerhart*, 461 U.S. 424, 434-35, 103 S.Ct. 1933, 1939-40, 76 L.Ed.2d 40 (1983).

In establishing parameters for the application of the fee shifting statute, 42 U.S.C. § 2000e-5(k), and 42 U.S.C. § 1988, the Supreme Court, in *New York Gaslight Club, Inc. v. Carey*, 447 U.S. 54, 100 S.Ct. 2024, 64 L.Ed.2d 723 (1980) had, as early as June, 1980, addressed the issue whether a

---

reference to the full award achieved. Moreover, Yourdon's characterization of the overall results (including state law awards) as "irrelevant" to the Title VII enforcement action was rejected by the circuit court as unsupported as a matter of law.

prevailing plaintiff on a discriminatory employment complaint, filed at the New York State administrative level pursuant to Title VII and applicable NYS Human Rights Law, Exec. Law § 296, could seek attorneys' fees for those proceedings, without an independent federal action filed under Title VII in federal court. This Court ruled that Title VII authorized a federal court to award fees in an action for fees only, without an independent federal action seeking enforcement of a Title VII claim. In *North Carolina Department of Transportation v. Crest Street Community Council, Inc.*, 479 U.S. 6, 12, 107 S.Ct. 336, 93 L.Ed.2d 188 (1986), the Court further held that plaintiffs in a Title VI claim must seek enforcement of their claims "in suits," "through courts," and by "judicial process" (citing *Webb v. Dyer County Board of Education*, 471 U.S. 234, 241, n.16, 105 S.Ct. 1923, 1927-1928, 85 L.Ed.2d 233 (1985)).

These cases are instructive to this case as well. Justice O'Connor wrote in her majority opinion:

> "Moreover, to support its statement that the 'parties may be considered to have prevailed when they vindicate rights through a consent judgment or *without formally obtaining relief*,' the Senate Report cited cases that involved at a minimum the filing of a judicial complaint. [citations omitted]. . . . The House Report, even while it stresses that 'prevailing party' is not intended to be limited to the victor only after entry of a final judgment following a full trial on the merits, clearly contemplated that parties obtaining fees would have initiated civil rights litigation." (Emphasis added) *North Carolina Department of Transportation v. Crest Street Community Council, Inc.*, 479 U.S. at 12-13 (1986).

This Court had long established, and the circuit court has recognized, that a federal civil rights claim under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e *et seq.*, and the NYS Exec. Law § 296, are *"virtually identical."* See for example, *Song v. Ives Laboratories, Inc.*, 957 F.2d 1041, 1048 (2d Cir. 1992), citing reference to *Kremer v. Chemical Construction Corp.*, 456 U.S. 461, 479-80, 102 S.Ct. 1883, 1896, 72 L.Ed.2d 262 (1982). The Second Circuit followed *Kremer* and ruled that:

> "In light of New York's wholesale adoption of federal standards in discrimination cases under Executive Law [§]296 claims, we find that . . . , a district court sitting at equity in a Title VII action must resolve the Title VII claims in accordance with the jury's determination on the Executive Law § 296 claim." *Song v. Ives Laboratories, Inc.*, 957 F.2d at 1048.

Yourdon absolutely refused to recognize, and indeed, has chosen not to mention throughout their argument in support of a writ of certiorari, the plain and simple fact, that Ms. Bridges was successful on her backpay Title VII claim and recovered $20,000 for pain and injuries related to the violation of her civil rights. It is undisputed that she and the other respondents succeeded on the merits of their Title VII claim against petitioner and on their related New York State Executive Law § 296 claim, both of which involved:

> " . . . a common core of facts or [are] based on related legal theories. Much of counsel's time will be devoted generally to the litigation as a whole, making it difficult to divide the hours expended on a claim-by-claim basis. *Such a lawsuit cannot be viewed as a series of discrete claims.*

> *Instead the district court should focus on the significance of the overall relief obtained by the plaintiff. . . . " (Emphasis added) Hensley v. Eckerhart,* 461 U.S. 424, 434, 103 S.Ct. 1933, 76 L.Ed.2d 40 (1983). See *Song v. Ives Laboratories, Inc.*, 957 F.2d 1041, 1048 (2d Cir. 1992), citing reference to *Kremer v. Chemical Construction Corp.*, 456 U.S. 461, 479-80, 102 S.Ct. 1883, 1896, 72 L.Ed.2d 262 (1982).

This Court has held, and it is a matter of settled law, that a suit seeking relief under both Title VII and a related State Fair Employment Law is "an action or proceeding" under Title VII, within the meaning of § 706(k), 42 U.S.C. § 2000e-5(k), as amended. The plain meaning of § 706(k), 42 U.S.C. § 2000e-5(k), as amended, is that a plaintiff who prevails on any claim in that proceeding which is also covered under Title VII is presumptively entitled to attorneys' fees.

The circuit court, with this Court's guidance, held that

> " . . . A plaintiff prevails when she 'succeeds' – and hence 'prevails' – 'when actual relief on the merits of [her] claim materially alters the legal relationship between the parties by modifying the defendant's behavior in a way that directly benefits the plaintiff.' *Farrar,* 506 U.S. at 111-12; see also *Texas State Teacher's Ass'n v. Garland Indep. Sch. Dist.*, 489 U.S. 782, 792-93 (1989) ('[t]he touchstone of the prevailing party inquiry must be the material alteration of the legal relationship of the parties in a manner

> which Congress sought to promote'); (Cite omitted)."• (CA-4-5)

The circuit court further reasoned that

> "Bridges, . . . has not lost on the merits of her federal claim. Rather, she has secured: (1) a favorable judgment on the merits but no damages because of her failure to mitigate under Title VII; and (2) a favorable judgment on the merits, and *substantial damages*, under the New York State Human Rights Law. We conclude that this constitutes sufficient success to make Bridges a 'prevailing party' eligible for attorneys' fees and costs under § 2000e-5(k)." (CA-5)

The circuit court found that Ms. Bridges is a "prevailing party" eligible for attorneys' fees under § 2000e-5(k) and affirmed the judgment of the district court.

The circuit court followed this Court's holdings in *Farrar v. Hobby*, 506 U.S. 103 (1992), *Hensley v. Eckerhart*, 461 U.S. 424 (1983) and *Texas State Teachers Ass'n v. Garland Indep. School Dist.*, 489 U.S. 782, 792 (1989) in fully affirming the district court's decision that Ms. Bridges was a "prevailing party" eligible for an attorneys' fee award.

Indeed, the circuit court *pointedly rejected the petitioner's argument* ["that Bridges did not prevail" or "recover any monetary relief" (CA-6)] and ruled consistent with the record and this Court's guidance in *Farrar* and *Hewitt* as applicable to the actual facts in this case. The circuit court ruled that:

> "In arguing that Bridges is not a prevailing party, Yourdon relies heavily on *Farrar's* statement that 'a judicial pronouncement that the

> defendant has violated the [plaintiff's rights], unaccompanied by an enforceable judgment on the merits, does not render the plaintiff a prevailing party. Of itself, the "moral satisfaction [that] results from any favorable statement of law" cannot bestow prevailing party status.' *Farrar*, 506 U.S. at 112-13 (quoting *Hewitt v. Helms*, 482 U.S. 755, 762 (1987) (alteration in original)). We find this caution from *Hewitt* inapposite. First, *Bridges has obtained more than Hewitt's 'interlocutory ruling'* (later lost in the course of litigation resulting in a judgment against the plaintiff). *See Hewitt*, 482 U.S. at 760. *Indeed, she has obtained exactly what the Hewitt Court called for: an actual favorable judgment requiring Yourdon to pay damages. Second, neither Farrar nor Hewitt dealt with a plaintiff who had achieved substantial success – and a large monetary award – on pendent state-law claims."* (CA-6) (Emphasis added)

This Court has long recognized that Congress intended to make it easier for a plaintiff of limited means to bring a meritorious suit under Title VII. A civil rights plaintiff occupies a role that has been termed that of a "private attorney general" in pursuit of a high priority policy; such a plaintiff is ordinarily to be awarded attorneys' fees when prevailing, except in a few special cases. Absent a fee shifting statute, few sex based discrimination and sexual harassment plaintiffs would have the means to pursue their cases. Congress intended to encourage individual plaintiffs faced with discrimination to seek judicial enforcement and relief. *See North Carolina Department of Transportation v. Crest Street Community Council, Inc.*, 479 U.S. 6, 107 S.Ct. 336 (1986); *Newman v.*

Piggie Enterprises, 390 U.S. 400, 88 S.Ct. 964, 19 L.Ed.2d 1263 (1988).

> " . . . the purpose of [42 U.S.C. § 2000e-5(k)] to facilitate the bringing of discrimination complaints, the humanitarian remedial policies of Title VII, and the statutes structure of cooperation between federal and state enforcement authorities . . . with proceedings before the EEOC and in federal courts being supplements to available state remedies . . . all point to the conclusion that fee awards are authorized for work done in state administrative or judicial proceedings as well as in federal proceedings." *New York Gaslight Club, Inc. v. Carey*, 447 U.S. at 55.

> "It is clear from this scheme of interrelated and complementary state and federal enforcement that Congress viewed proceedings before the EEOC and in federal court as supplements to available state remedies for employment discrimination. Initial resort to state and local remedies is mandated, and recourse to the federal forums is appropriate only when the State does not provide prompt or complete relief." *New York Gaslight Club, Inc. v. Carey*, 447 U.S. at 65.

B. Bridges Was A Prevailing Party For Purposes Of Obtaining An Award Of Attorneys' Fees And Expenses.

Routinely, courts have determined "prevailing party" status of plaintiffs in civil rights litigation by looking to the benefits secured, not to the mechanism which secures those benefits. This Court has ruled that

> "It is settled law, of course, that relief need not be judicially decreed in order to justify a fee award under § 1988. A lawsuit sometimes produces voluntary action by the defendant that affords the plaintiff all or some relief he sought through a judgment – *e.g*, a monetary settlement or *a change in conduct that redresses the plaintiff's grievances*. . . . In all civil litigation, the judicial decree is not the end but the means. *At the end of the rainbow lies not a judgment, but some action* (or the cessation of action) *by the defendant that the judgment produces – the payment of damages*, or some specific performance, or the termination of some conduct. Redress is sought through the court, but from the defendant. (Emphasis added) *Hewitt v. Helms*, 482 U.S. 755, 760-761 (1987).

For plaintiffs to be considered "prevailing parties" this Court requires that the plaintiffs have to be able to point to a resolution of a dispute which changes the legal relationship between the plaintiffs and the defendant on *"any significant issue."* (Emphasis added) See for example, *Texas State Teachers Ass'n v. Garland Indep. School Dist.*, 489 U.S. 782, 790, 109 S.Ct. 1486, 1493, 103 L.Ed.2d 866 (1989); *Gingras v. Lloyd*, 740 F.2d 210, 212 (2d Cir. 1984). Certainly, when the plaintiffs obtain "an enforceable judgment against the defendant from whom fees are sought" the plaintiffs are entitled to be considered "prevailing," not only in a "technical sense" but also in a material sense.

The district court noted that the circuit court follows Supreme Court guidance in this regard. In his February 6, 1996, opinion (A-21, at 24-26) following payment on the Judgment of April, 1995, Judge Carter stressed that *all three plaintiffs* "prevailed" on their Title VII hostile work

environment claims against defendant Yourdon. Judge Carter added that

> "The Second Circuit abides by United States Supreme Court precedent that '[a] party who achieves only partial success in his or her suit may be considered to be a "prevailing party" where he or she *'succeed[s] on any significant issue in litigation which achieves some of the benefit- . . . sought in bringing suit.'* (Emphasis added) *Ruggiero v. Krzeminski*, 928 F.2d 558, 564 (2d Cir. 1991), quoting *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983). Furthermore, 'success may be assessed by examining whether plaintiffs can "point to a resolution of the dispute which changes the legal relationship between [them] and the defendant[s]." ' *Ruggiero*, 928 F.2d at 564, quoting *Texas State Teachers Ass'n v. Garland Indep. School Dist.*, 489 U.S. 782, 792 (1989)."

The Second Circuit found that:

> "Bridges' federal civil rights claim was heard, *and it was decided in her favor. She also won a substantial monetary award under her related state-law claim.* That is to say, she obtained 'relief on the merits of [her] claim[s]' which, by compelling Yourdon to pay actual damages, 'materially alter[ed] the legal relationship between the parties,' *Farrar*, 506 at 111-12, and through which she has 'achieve[d] some of the benefit [she] sought in bringing suit.' Id at 109. Bridges is therefore a 'prevailing party' eligible for attorneys' fees and costs. See *Aubin v. Fudala*, 782 F.2d 287, 290-91 (1st Cir. 1986); *Williams v. Thomas*, 692 F.2d 1032, 1036 (5th Cir. 1982)." (Emphasis added) (CA-6)

The circuit court found the cases cited by the petitioner for support to be "inapposite." Indeed, the circuit court found that the petitioner cited cases that "uniformly stand for the proposition that a plaintiff may not recover attorneys' fees for a *losing* Title VII claim." (CA-5)

Petitioner, once again, seeks to refer to these same *losing* cases in a strained attempt to ignore Bridges' successful Title VII and state monetary award. Furthermore, petitioner erroneously treats Bridges' award as though she had two entirely separate and distinct lawsuits, one having absolutely nothing to do with the other. Petitioner fails to provide any law in support of its argument. Yourdon makes an unsupported inferential leap in an attempt to have the Supreme Court ignore the statutory [42 U.S.C. § 2000e-5(k)] directive that "[i]n any *action or proceeding under . . . [Title VII]* the Court . . . may allow the prevailing party, . . . a reasonable attorneys' fee . . . " for the overall relief respondents obtained. *Yourdon's petition is based solely on its legally unsupported claim that treats Title VII as having absolutely no relationship to a New York State Exec. Law claim and ignores settled Supreme Court decisional law to the contrary.*

Once again, petitioner, inexplicably and erroneously cites reference to cases in which a plaintiff *lost* on the merits of his/her federal claims or had his/her federal claims dismissed. Those cases are wholly "inapposite" to the case at bar where the respondents, clearly, and undeniably, recovered tens of thousands of dollars on the essential merits of their Title VII and state law claims.

The petitioner cites the following cases for support, for example, *National Org. for Women v. Operation Rescue,*

37 F.3d 646, 653-654 (D.C. Cir. 1994) (plaintiffs who *lost on the merits* of their federal civil rights claim were not considered "prevailing parties" for purposes of an award of attorneys' fees under 42 U.S.C. § 1988); *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 113 S.Ct. 753, 122 L.Ed.2d 34 (1993) (plaintiffs who *failed* to state, and were not entitled to pursue, a claim for relief under federal statute [42 U.S.C. § 1985(3)] were not entitled to any attorneys' fees and expenses); *Mateyko v. Felix*, 924 F.2d 824 (9th Cir. 1990), *cert. denied*, 502 U.S. 814, 112 S.Ct. 65, 116 L.Ed.2d 40 (1991) (plaintiff *lost* all of his federal claims on the merits); *Rhodes v. Stewart*, 488 U.S. 1, 3 (1988) (plaintiffs who either died or released from prison before favorable *judgment mooted* any possible benefit to them not considered prevailing); *Albright v. Good Shepherd Hosp.*, 901 F.2d 438 (5th Cir. 1990) (plaintiff's favorable judgment on his federal *claim was reversed*); *Kelly v. City of Leesville*, 897 F.2d 172 (5th Cir. 1990) (jury found that plaintiff's federal *rights had not been violated*); *National Private Truck Council, Inc. v. Oklahoma Tax Comm'n*, ___ U.S. ___, 115 S.Ct. 2351, 132 L.Ed.2d 509 (1995) (federal [42 U.S.C. § 1983] *relief was unavailable* where there was an adequate [state] legal remedy); *McLaughlin v. State*, 784 F.Supp. 961, 980 (N.D.N.Y. 1992) (an application for attorneys' fees based on an interlocutory decision in favor of plaintiff denying a summary motion to dismiss a Title VII *claim* and not decided on the merits was *deemed premature*); *Slade v. United States Postal Service*, 952 F.2d 357 (10th Cir. 1991) (interlocutory relief permitting plaintiff to go forward on the merits is *not "some relief on the merits"* of his claims giving rise to entitlement for attorneys' fees); *Walker v. Anderson Elec. Connectors*, 944 F.2d 841, 847

(11th Cir. 1991), *cert. denied*, 506 U.S. 1078 (1993) (plaintiff who *failed* to recover any damages under Title VII and pendent state tort claims was not considered prevailing); *Pedigo v. P.A.M. Transport, Inc.*, 98 F.3d 396 (8th Cir. 1996) (an Americans with Disabilities Act (ADA) plaintiff who *recovered nothing* on only federal claim is not prevailing); *Jackson v. Galan*, 868 F.2d 165 (5th Cir. 1989) (plaintiff who recovered *no relief* against a specific defendant and obtained "no alteration" in defendant's conduct not entitled to attorneys' fees); *Hanrahan v. Hampton*, 446 U.S. 754, 757 (1980) (*interlocutory denial* of a motion in plaintiff's favor concerning discovery orders not considered prevailing for attorneys' fees award); *Cramblit v. Fiske*, 33 F.3d 633 (6th Cir. 1994) (a plaintiff who *failed* to prove any actual or compensatory damage under essential federal statutory or state law claims denied attorneys' fees).

Likewise, petitioner cites reference to cases which it purports to be of some guidance, but which have no factual or legal application to the facts and the law applicable to the success of respondents ($124,110.65) or Bridges ($20,000.00) in this case.

For example, petitioner cites cases where only a nominal damage ($1.00) or insignificant relief was awarded. In *Milton v. Des Moines*, 47 F.3d 944 (8th Cir. 1995), *cert. denied*, ___ U.S. ___, 116 S. Ct. 87 (1995) (a plaintiff who recovered $1.00 compensatory award and $1.00 punitive damage award entitled to $10,000.00 in attorney fees for violation of 42 U.S.C. § 1983, the right to be free from cruel and unusual punishment, considered of more significance than *Farrar's* allegations concerning a business issue); *Cartwright v. Stamper*, 7 F.3d 106 (7th Cir. 1993) (a

plaintiff's nominal award, failure to establish the significance of the legal issues, and lack of public purpose served by the litigation, warranted a no fee finding); *Romberg v. Nichols*, 48 F.3d 453 (9th Cir. 1995) (the plaintiffs' nominal $1.00 award and failure to identify any nonmonetary success resulting from litigation did not warrant a fee award).

Indeed, petitioner also misapplies the Supreme Court's decision in *Farrar v. Hobby*, 506 U.S. 103, 113 S.Ct. 566, 121 L.Ed.2d 494 (1992) to the facts in this case. Bridges [all the respondents] recovered substantial monetary awards on the essential elements of her [their] Title VII and state law claims. These results are entirely "inapposite" to the result in the *Farrar* case. In *Farrar*, the plaintiffs did not recover any damages on their federal law [42 U.S.C. § 1983] claims and *they had no state law claims*. The jury found that the defendant's conduct was not a "proximate cause of any damages" suffered by the plaintiffs. On appeal the Fifth Circuit remanded the case for entry of a judgment against the defendant for a nominal damage ($1.00) [considered a "technical victory"].

It would be anomalous that a court hearing a Title VII civil rights claim may award attorneys' fees for time spent on administrative proceedings to enforce civil rights claims prior to litigation and not award attorneys' fees for time spent in a federal judicial proceeding resulting in a favorable state law finding and success on the merits of the federal claim. *New York Gaslight Club, Inc. v. Carey*, 447 U.S. 54, 100 S.Ct. 2024, 64 L.Ed.2d 723 (1980); *North Carolina Department of Transportation v. Crest Street Community Council, Inc.*, 479 U.S. at 14, cited reference to

Carey, [447 U.S. 54]. Bridges' award of $20,000.00 in compensatory damages awarded in an action or proceeding seeking to enforce her successful and meritorious Title VII claims is relevant to her "prevailing party" status and cannot be ignored.

The Second Circuit, clearly understands the significance of the *Farrar* decision and has properly applied the Supreme Court's guidance in *Farrar* and other cases to this case establishing that Bridges was a "substantially successful" and "prevailing party."

II

THE SECOND CIRCUIT PROPERLY AFFIRMED THE DISTRICT COURT'S ATTORNEYS' FEE AWARD CONSISTENT WITH THIS COURT'S HOLDING IN *FARRAR v. HOBBY*, 506 U.S. 103 (1992) AND PRIOR RULINGS

A. The Second Circuit Considered Respondents' Overall Success On The Merits Of Title VII And Pendent State Law Claims

The Second Circuit fully considered *Farrar v. Hobby*, 506 U.S. 103 (1992) and prior rulings, and the entire judgment, in light of the overall success of the respondents on the merits of their Title VII and pendent state law claims in considering the award of attorneys' fees and expenses. Unlike the plaintiffs in *Farrar* and *Hewitt*, the respondents in this case, including Bridges, had achieved "substantial success" on most of the significant claims that they and she sought to recover. The award of legal fees was deemed reasonable in light of the overall success of the respondents.

In *Farrar*, the plaintiff recovered a nominal ($1.00) award constituting a "technical victory." Justice O'Connor reasoned that "[w]hen the plaintiff's success is purely technical or de minimis, no fees can be awarded." *Farrar*, 506 U.S. at 117. But Justice O'Connor added that the extent of success was not the only measure applied for consideration. She held that

> "[t]he difference between the amount recovered and the damages sought is not the only consideration, however. *Carey v. Piphus*, 435 U.S. 247, 254 (1978), makes clear that an award of nominal damages can represent a victory in the sense of vindicating rights even though no actual damages are proved. . . . Accordingly, the courts also must look to other factors. *Instead, it* [attorneys' fees] *is a tool that ensures the vindication of important rights, even when large sums of money are not at stake, by making attorneys' fees available under private attorney general theory.* (Emphasis added)

This Court has provided that a district court's determination of the amount of an attorneys' fee award is reviewable only for an *abuse of discretion. Pierce v. Underwood*, 487 U.S. 552, 571 (1988). However, request for attorneys' fees should not result in a second major litigation. *Hensley v. Eckerhart*, 461 U.S. 424, 437, 103 S. Ct. 1933, 76 L.Ed.2d 40 (1983). See *Terminate Control Corp. v. Horowitz*, 28 F.3d 1335, 1342 (2d Cir. 1994).

Moreover, the Supreme Court in *City of Riverside v. Rivera*, 477 U.S. 561 (1986) held that while the amount of damages a plaintiff recovers is certainly relevant to the amount of attorneys' fees to be awarded, it is, however, only one of many factors that a court should consider in

calculating an award of attorneys' fees. *"We reject the proposition that fee awards . . . should necessarily be proportionate to the amount of damages a civil rights plaintiff actually recovers." City of Riverside*, 477 U.S. at 573 (emphasis added).

It has long been settled law that a "strict proportionality" standard has been rejected by this Court. Yourdon's argument that the respondents' attorneys' fee award is disproportionate to only one of the respondent's award of compensatory damages, or to other similar awards, has been rejected as not a proper basis for determining appropriate attorneys' fee awards. Petitioner has ignored the Supreme Court's guidance in *Hensley v. Eckerhart, supra*, regarding the twelve factors essential for a fee award and "lodestar" review. These factors, which were considered by the district court in this case, are a) time and labor required; b) novelty and difficulty of the questions; c) the skill requisite to perform the legal service properly; d) preclusion of other employment of the attorney in taking the case; e) customary fee; f) whether the fee is fixed or contingent; g) time limitations imposed by the client or the circumstances; h) the amount involved and the results obtained; i) experience, reputation, ability of the attorneys; j) the undesirability of the case; k) nature and length of the professional relationship with the client; and l) attorney fee awards in similar cases. The Second Circuit had applied the Fifth Circuit approach in *U.S. Football League v. National Football League*, 887 F.2d 408, 415 (2d Cir. 1989) *cert. denied*, 493 U.S. 1071, 107 L.Ed.2d 1022, 110 S. Ct. 1116 (1990) as guidance in reviewing fee awards.

B. In Affirming The District Court's Fee Award The Second Circuit Followed *Farrar v. Hobby* And Prior Rulings Of This Court

The circuit court's reasoning in this case is entirely consistent with Justice O'Connor's guidance in *Farrar v. Hobby*, 506 U.S. at 115. Following the reasoning of Justice O'Connor in the *Farrar* decision, that "[i]n the context of this [Farrar] litigation, the technical . . . nature of [Farrar's] victory is readily apparent: . . . " *Farrar v. Hobby*, 506 U.S. at 120, the Second Circuit ruled in *Pino v. Locascio*, 101 F.3d 235, 237 (2nd Cir. 1996) that in determining whether an award of attorneys' fees is appropriate requires a two-step process. First, the party must be a "prevailing party" and second, the "most important factor in determining the reasonableness of a fee is the degree of success obtained" (citing reference to *Farrar*).

In the *Pino* case the Second Circuit ruled that a ["readily apparent"] nominal damage of $1.00 and a failure "to prove an essential element of his claim" warrants "no fee at all." After its *Pino* decision, the Second Circuit, in *Carrol v. Blinken*, 105 F.3d 79, 81 (2d Cir. 1997) emphasized that the *Pino* case stands for the proposition "that in determining the reasonableness of a fee award in civil rights actions the quantity and quality of relief obtained is a critical factor." Thereafter, in *Orchano v. Advanced Recovery, Inc.*, 107 F.3d 94 (2d Cir. 1997) the Second Circuit provided additional insight into its understanding of the Supreme Court's guidance in *Farrar* which also cited reference to its decision in *Hensley v. Eckerhart*, 461 U.S. 424, 436 (1983). In *Orchano*, 107 F.3d at 98, the Second Circuit reasoned that *Farrar* exemplifies those circumstances

when an award of attorneys' fees under special circumstances would be "unjust." Once having determined that an attorneys' fee award would "not be unjust," the district court may properly consider the twelve factors the Supreme Court set out in *Hensley* that should be followed in determining what constitutes a "reasonable fee" within the meaning of § 1988 and other fee-shifting statutes.

Clearly, the circuit court had properly applied *Farrar v. Hobby* and the other Supreme Court decisions in reviewing appeals concerning attorney fee awards. In this case, the substantial monetary recovery of the respondents ($124,110.65) was "readily apparent" to the circuit court. It was not a "technical victory" by any means. Certainly not one which would invite a special consideration to deny a fee award. Moreover, the circuit court cited reference to *Farrar* as supporting a full affirmance of the lower court's award of attorneys' fees, while rejecting Yourdon's unsupported notion that the pendent state claim was irrelevant. The circuit court concluded that Bridges recovered a substantial sum from the petitioner and Kodak; that her success (as well as the other respondents) was clearly not "technical;" but was indeed "substantial" on the merits, and affirmed the attorneys' fee award as fully

> *" . . . justified, however, by the length of this litigation, the acrimony and vigor with which every point was contested, and that such cases be brought as remedies for violations of civil rights." Bridges v.*

> *Eastman Kodak Co.*, 91 Civ. 7985, 1996 WL 47304, *12 (S.D.N.Y. Feb. 6, 1996) (Carter, J.).(A-30).

and further, that this case

> *" . . . contributed to Title VII case law and helped to realize Congress's intent in passing the Civil Rights Act of 1964. Plaintiffs, and others like them who suffer from sexual harassment, must have appropriate remedies available to them or their rights become meaningless. Attorneys' fees are one way to ensure that such avenues remain open.* See *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400, 402 (1968) (affirming that Congress enacted legislation authorizing fee awards in civil rights cases in order *to enable those whose rights have been violated to seek redress in the courts)."* (Emphasis added)(A-30).

Indeed, this case involved complex and novel issues of evolving law spanning the period between *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 106 S.Ct. 2399, 91 L.Ed.2d 49 (1986) and pre- and post-amendments to the Civil Rights Act of 1964, Title VII, as amended, 42 U.S.C. § 2000e *et seq.* [November 21, 1991, 42 U.S.C § 1981-A (CRA 1991)]. The outcome in this case gave rise to a number of decisions that remain the subject of law review articles, bar association conferences, and precedented case law.

The circuit court has correctly applied this Court's holdings in *Farrar v. Hobby*, and other rulings in fully affirming the lower court's attorneys' fee award for all the respondents.

III

THIS COURT SHOULD HAVE NO INTEREST IN GRANTING A WRIT OF CERTIORARI IN THIS CASE

This case represents the proper application of this Court's holdings regarding the application of the attorney fee shifting statute in civil rights cases. The civil rights victim does not have the financial resources to litigate a claim against a large Fortune 100 company, particularly one that is prepared to spend seemingly unlimited resources to frustrate and discourage its employees from suing for violation of their rights. These same civil rights victims often are lower salaried employees who are required to mitigate damages. Therefore, their potential recovery may not be as great.

Nevertheless, corporate defendants that refuse to accept responsibility for the actions of its supervisors and agents who discriminate against employees because of their sex in the employment context, and who make no effort to resolve legitimate claims, and defend at all costs, must reasonably anticipate that successful plaintiffs will seek to recover attorneys' fees. The vast majority of discrimination cases would not be brought, indeed they would be discouraged as Kodak and Yourdon has attempted to do, if plaintiff's counsel could not recover a reasonable fee for the services rendered. Plaintiff's counsel cannot, and should not, be compelled to abandon the client when confronted by overwhelming litigation defense tactics. Otherwise, wealth and power will dictate the direction of these high priority public policies and how effective the civil rights statutes will be applied. Respondents submit that this appeal, by petition for a

writ of certiorari, is an example of petitioner's tactics in this case.

This Court and the Second Circuit has recognized that attorneys' fees are reflective of the nature of the outcome in the case as well as the significance and benefit the public derived from the case, the work performed, the quality of the services rendered, and the experience of the plaintiff's counsel necessary to accomplish a successful result.

Circuit courts, including the Second Circuit, have consistently applied *Farrar v. Hobby*, and refused to allow attorney fee awards in cases resulting in a purely "technical" recovery. *This case was not such a case.*

For this Court to grant the writ of certiorari it must accept the petitioner's argument that this Court: (1) ignore settled law and respondents' successful and favorable jury award and finding based on a Fair Employment statute supplementing Title VII as deemed relevant to an attorney fee award, (2) ignore the overall and substantial monetary results satisfied by Kodak and Yourdon paid to all the respondents, (3) ignore the settled law against a "strict proportionality" standard, (4) ignore the *Farrar v. Hobby* standard defining who is a "prevailing party", (5) ignore the twelve *Hensley* factors of review applicable to district courts in awarding reasonable attorneys' fees, and (6) ignore the efforts of the defendants to frustrate the purpose of the civil rights laws while refusing to participate in resolving the matter throughout the course of litigation.

The facts in this case were historically unique given the timing of the case (1990) and the enactment of the

Civil Rights Act of 1991 (November 21, 1991) providing for compensatory relief similar to State Fair Employment laws. Moreover, the likelihood that a corporate defendant will be willing to incur attorneys' fees and costs and not resolve legitimate civil rights claims brought by employees should also be rare. For these reasons, and the reasons argued hereinabove, this Court should have no interest in granting a writ of certiorari.

CONCLUSION

For the reasons discussed above petitioner's writ for certiorari in all respects should not be granted.

Respectfully submitted,

LAWRENCE SOLOTOFF
Counsel of Record
SOLOTOFF & SOLOTOFF
P.O. Box 4686
Great Neck, New York 11023
(516) 466-5522
Counsel for Respondents

May 1997

Supreme Court, U.S.
FILED
MAY 22 1997
OFFICE OF THE CLERK

(3)

No. 96-1432

In The

Supreme Court of the United States

October Term, 1996

YOURDON, INC.,

Petitioner,

vs.

SUSAN Q. BRIDGES, VIRGINIA D'APONTE and KIMBERLY MURYASZ,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITIONER'S REPLY BRIEF

Mark A. Gerard
Counsel of Record
Thomas G. Dignan
NIXON, HARGRAVE, DEVANS & DOYLE LLP
Clinton Square, P.O. Box 1051
Rochester, New York 14603-1051
(716) 263-1000
Counsel for Petitioner

Daily Record Corporation
Rochester, New York
(22274)

7 pp

PARTIES TO THE PROCEEDING, PARENT COMPANIES AND NONWHOLLY OWNED SUBSIDIARIES

Pursuant to Rule 29.6 of this Court's rules, petitioner Yourdon, Inc. submitted a statement of parties, parent companies and nonwholly owned subsidiaries on page ii of its petition for certiorari, filed with the Court on March 10, 1997.

TABLE OF CONTENTS

PARTIES TO THE PROCEEDING, PARENT COMPANIES AND NONWHOLLY OWNED SUBSIDIARIES i

TABLE OF CONTENTS ii

TABLE OF CITED AUTHORITIES iii

A PLAINTIFF'S RECOVERY UNDER THE NEW YORK HUMAN RIGHTS LAW IS IRRELEVANT FOR PURPOSES OF TITLE VII FEE-SHIFTING 1

CONCLUSION 3

TABLE OF CITED AUTHORITIES

CASES

Gerena-Valentin v. Koch, 739 F.2d 755 (2nd Cir. 1984) 2

Hensley v. Eckerhart, 461 U.S. 424 (1983) 3

New York Gaslight Club, Inc. v. Carey, 447 U.S. 54 (1980) 1, 2

Reichman v. Bonsignore, Brignati & Mazzotta, 818 F.2d 278 (2d Cir. 1987) 2

Webb v. Dyer County Bd. of Educ., 471 U.S. 234 (1985) 2, 3

STATUTES

New York State Human Rights Law, Executive Law, Article 15, § 291, et seq. 1, 2

Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq.* 2

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1996

YOURDON, INC.,

Petitioner,

vs.

SUSAN Q. BRIDGES, VIRGINIA D'APONTE and KIMBERLY MURYASZ,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITIONER'S REPLY BRIEF

A PLAINTIFF'S RECOVERY UNDER THE NEW YORK HUMAN RIGHTS LAW IS IRRELEVANT FOR PURPOSES OF TITLE VII FEE-SHIFTING

It is well established that plaintiffs are not entitled to attorneys' fees under the New York Human Rights Law. As this Court has noted, "[t]he Human Rights Law of the State of New York does not authorize an award of counsel fees for work done in either state administrative or **judicial** proceedings." *New York Gaslight Club, Inc. v. Carey*, 447 U.S. 54, 67, n.7 (1980) (emphasis added).

The cases cited by respondents are distinguishable. Not one of them holds that a plaintiff may recover attorneys' fees under Title VII for a financial recovery soley under a claim premised upon the New York Human Rights Law. Respondents' interpretation of *New York Gaslight Club, Inc. v. Carey*, *supra*, 447 U.S. 54, is overly expansive. There, this Court determined that the plaintiff could recover attorneys' fees for work performed in state **administrative** proceedings that federal law **required** the plaintiff to pursue before bringing a federal claim. *See Webb v. Dyer County Bd. of Educ.*, 471 U.S. 234, 241 (1985) (distinguishing the situation where a statute stands as an independent avenue of relief from the one addressed in *New York Gaslight Club* where Title VII "**required**" a plaintiff to pursue administrative remedies before bringing suit) (emphasis added). *See also Gerena-Valentin v. Koch*, 739 F.2d 755, 761 (2d Cir. 1984) (referencing the holding in *New York Gaslight Club* thus: "attorney's fees awarded under 42 U.S.C. § 2000e-5(k) for time spent in certain **administrative** proceedings **necessary** to the litigation," and affirming denial of fees for time spent in "preclearance review" because it was not necessary to litigation) (emphasis added); *Reichman v. Bonsignore, Brignati & Mazzotta*, 818 F.2d 278, 283 (2d Cir. 1987) ("we conclude Congress intended a fee award under the ADEA to cover time spent on administrative proceedings that were a **prerequisite** to the [federal] action") (emphasis added). Yourdon has never disputed that rule.

However, because a pendent state claim is not a prerequisite for a federal action under Title VII, recovering on such a state claim alone[1] simply does not entitle Bridges to attorneys' fees.

---

[1] The district court's judgment provides that Bridges "makes no financial recovery under [Title VII]." (A-42). Moreover, the district court expressly held that "Bridges cannot recover money damages on her Title VII claims." (A-12).

As respondents attempt in the present action, the plaintiff in *Webb v. Dyer County Bd. of Educ.*, 471 U.S. 234 (1985) attempted to expand the scope of the *Hensley v. Eckerhart* decision by arguing that *Hensley* required fees for work done that is reasonably related to the enforcement of federal civil rights. This Court rejected such an overly expansive interpretation ruling: "[t]he Court's opinion in *Hensley* does not sweep so broadly." Id. at 242.

CONCLUSION

For these reasons and for the reasons stated in the petition, a writ of certiorari should issue to review the order of the United States Court of Appeals for the Second Circuit.

Respectfully submitted,

Mark A. Gerard
Counsel of Record
Thomas G. Dignan
NIXON, HARGRAVE, DEVANS
& DOYLE LLP
Clinton Square
P.O. Box 1051
Rochester, N.Y. 14603-1051
(716) 263-1000
Counsel for Petitioner

May 1997